



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 427

THE FRANKLIN NATIONAL BANK OF FRANKLIN
SQUARE, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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**IN SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION—SECOND DEPARTMENT**

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff-Appellant,
against

THE FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE,
Defendant-Respondent

STATEMENT UNDER RULE 234

This is an appeal by the People of the State of New York from a judgment rendered in the Supreme Court, Nassau County, which dismissed, after trial, the complaint in an action to enjoin the defendant bank from advertising, or soliciting or receiving deposits, as a savings bank, and from using the term "saving" or "savings" or their equivalent in the defendant's banking, financial business and dealings with the public.

The action, laid in New York County, was commenced by the service of a summons and complaint on May 12, 1950.

Issue was joined by defendant's service of an answer on June 20, 1950.

By order dated July 14, 1950, the action was removed to Nassau County.

[fol. 2] Trial was held before Mr. Justice Cuff, in Supreme Court, Nassau County, on January 23, 24, 25, 29, 30, 31, and February 1 and 2, 1951.

The judgment appealed from was rendered on June 7, 1951, and was entered on June 8, 1951.

Notice of appeal was served on June 22, 1951, and filed on June 25, 1951.

Plaintiff appeared by Nathaniel L. Goldstein, Attorney General of the State of New York. Defendant appeared by Alley, Cole, Grimes and Friedman, Esqs. There has been no change of parties or attorneys.

[fol. 3] IN SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NASSAU

[Title omitted]

NOTICE OF APPEAL—June 21, 1951

SIRS:

Please take notice, that the above named plaintiffs, The People of the State of New York, hereby appeal to the Supreme Court of the State of New York, Appellate Division, Second Department, from the final judgment made by Mr. Justice Thomas J. Cuff, in the above entitled action dated the 7th day of June, 1951 and entered in the office of the Clerk of the County of Nassau on the 8th day of June, 1951, which dismissed the plaintiffs' complaint in the above entitled action upon the merits after trial and awarded to the defendant the costs and disbursements of said action as taxed, amounting to the sum of \$96.30, and from each and every part thereof.

Dated: New York City, New York, June 21, 1951.

Yours, etc., Nathaniel L. Goldstein, Attorney General
of the State of New York, Attorney for Plaintiffs,
Office and P. O. Address, 80 Centre Street, New
York 13, New York.

To Alley, Cole, Grimes and Friedman, Esqs., Attorneys
for Defendant, 30 Broad Street, New York City. Charles
E. Ransom, Esq., Clerk of Nassau County.

[fol. 4] IN SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

Plaintiffs Designate New York County as the Place of Trial

[Title omitted]

SUMMONS—May 12, 1950

To the Above Named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice

of appearance, on the Plaintiffs' Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated: New York, New York, May 12, 1950.

Nathaniel L. Goldstein, Attorney General of the
State of New York, Attorney for Plaintiffs.

[fol. 5] IN SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

COMPLAINT

Plaintiffs, by Nathaniel L. Goldstein, Attorney General, complain of the defendant above named, and allege upon information and belief:

First: That at and during all the times hereinafter mentioned, the defendant, The Franklin National Bank of Franklin Square, formerly known as "The Franklin Square National Bank", was and still is a national banking association organized and existing as a corporate entity under the provisions of the National Banking Act (12 U. S. C. A., Section 21, et seq.) and authorized by Charter No. 12997 and the certificate dated October 13, 1926, issued by the Comptroller of the Currency to transact and transacting the business of banking in the Village of Franklin Square in the County of Nassau and State of New York, as provided in Section fifty-one hundred and sixty-nine of the Revised Statutes of the United States.

Second: That under the provisions of Section 258, subdivision 1, of the Banking Law of the State of New York, it is prohibited for any bank, trust company, national bank, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan [fol. 6] association to make use of the word "saving" or "savings" or their equivalent in its banking or financial business; and it is further prohibited by the provisions thereof for any individual or corporation other than a savings bank in any way to solicit or receive deposits as a savings bank.

Third: That the defendant was not, at any of the times herein mentioned, lawfully authorized or licensed to transact business as a savings bank in the State of New York or to hold itself out to the public as such.

Fourth: That from in and about the year 1947, to and including the date of the commencement of this action, the defendant has continued to use the term "saving" or "savings" in its banking, financial business and dealings with the public in the State of New York.

Fifth: That from in or about the year 1947, to and including the date of the commencement of this action, the defendant has solicited savings accounts for its bank conducted by it in the Village of Franklin Square in the County of Nassau as aforesaid by printed and exposed signs, printed circulars, stationery and varied and sundry advertising media, inclusive of newspapers in and on which the defendant publicly advertised and circulated the word "saving" or "savings."

Sixth: That the use of such words "saving" or "savings" by the defendant as aforesaid was calculated to and had the tendency and effect of leading the public to believe [fol. 7] that the defendant, contrary to the fact, was incorporated as a "savings bank" with all of the attendant public safeguards and benefits.

Seventh: That the use of such words "saving" or "savings" by the defendant as aforesaid was, and the continued use by the defendant thereof, is in violation of the provisions of Section 258, subdivision 1 of the Banking Law of the State of New York.

Eighth: That the plaintiffs, prior to the institution of this action, have demanded that the defendant terminate the use of the word "saving" or "savings" or their equivalent in its banking, financial business and dealings with the public in the State of New York and that said defendant exclude same from its signs and advertising matter circulated by it in the solicitation of business and deposits from the public in violation of such statute, but the defendant has failed and refused so to do.

(Paragraph Eight-A added on trial; allegations denied by defendant. See *infra*, pp. 115-116.)

Ninth: That the plaintiffs have no adequate remedy at law.

Wherefore, plaintiffs demand that a temporary injunction issue out of this Court and that the plaintiffs have a permanent injunction enjoining and restraining the defendant, its officer, agents, servants and employees from advertising in any manner or form or exposing any sign as a savings bank and/or soliciting or receiving deposits as a [fol. 8] savings bank in the State of New York and from using the term "saving" or "savings" or their equivalent in the defendant's banking, financial business and dealings with the public in the State of New York; and that the plaintiffs have such other and further relief as may be just and equitable in the premises together with the costs and disbursements of this action.

Nathaniel L. Goldstein, Attorney General of the
State of New York, Attorney for Plaintiffs.

(Verified by Assistant Attorney General Irving L. Rollins on May 12th, 1950.)

IN SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF
NEW YORK

ANSWER—June 19, 1950

Defendant, by its attorneys, Alley, Cole, Grimes & Friedman, for its answer to the complaint:

First: Denies each and every allegation contained in paragraph "Second" of the complaint, except that it admits that Section 258, Subdivision 1, of the Banking Law of the [fol. 9] State of New York reads as follows:

"No bank, trust company, national bank, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or use any advertisement containing the word 'saving' or 'savings', or their equivalent in relation to its banking or financial business, nor shall any individual or

corporation other than a savings bank in any way solicit or receive deposits as a savings bank; but nothing herein shall be construed to prohibit the use of the word 'savings' in the name of the Savings and Loan Bank of the State of New York or in the name of a trust company all of the stock of which is owned by not less than twenty savings banks. Any bank, trust company, national bank, individual, partnership, unincorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued."

Second: Denies each and every allegation contained in paragraph "Third" of the complaint, except that it admits that it is not a savings bank organized under, or subject to, the laws of the State of New York or authorized to represent itself as such.

[fol. 10] Third: Denies each and every allegation contained in paragraphs "Fourth" and "Fifth" of the complaint, except that it admits that it has used the term "saving" or "savings" in its business.

Fourth: Denies each and every allegation contained in paragraph "Sixth" of the complaint.

Fifth: Denies each and every allegation contained in paragraph "Seventh" of the complaint.

Sixth: Denies each and every allegation contained in paragraph "Eighth" of the complaint, except that it admits that plaintiffs, prior to the institution of the action, demanded that the defendant terminate the use of the words "saving" or "savings" in its advertising.

Seventh: Denies each and every allegation contained in paragraph "Ninth" of the complaint.

For a complete defense to the alleged cause of action set forth in the complaint defendant alleges:

Eighth: Defendant is a national banking association having its principal office and place of business at Franklin Square, Long Island, New York.

Ninth: Defendant has, since its organization in 1926, carried on a general banking business as a national banking

association and in the course of such business has accepted savings and other time deposits, as well as demand deposits. [fol.11] Tenth. In carrying on its business as aforesaid, defendant has placed various signs on its banking premises containing the word "savings" and has from time to time advertised the fact that it accepts savings deposits.

Eleventh. Defendant's said activities have been duly approved by the Comptroller of the Currency, the government administrative officer charged by the applicable Federal statutes with the supervision of defendant.

Twelfth. Defendant's said activities are, and have been duly authorized and sanctioned by the Federal statutes relating to national banking associations and their operations, including, among others, the following Federal statutes, to wit: 12 U. S. C. A. § 24; 12 U. S. C. A. § 371; 12 U. S. C. A. §§ 583-585; 588a, as well as the duly adopted regulations of the Board of Governors of the Federal Reserve System.

Thirteenth: Section 258, Subdivision 1, of the Banking Law of the State of New York provides as set forth in Paragraph "First" hereof.

Fourteenth. In so far as said Section 258, Subdivision 1, of the Banking Law of the State of New York purports to relate to this defendant and other national banking associations, and in so far as it purports to prohibit national banks from accepting savings deposits or making use of the terms "savings" or "savings", the same is invalid for the following reasons, among others, to wit:

[fol.12] a. The said statute is in direct conflict with the Constitution and the paramount laws of the United States;

b. The said statute unduly interferes with and hinders the operations of instrumentalities of the Federal government, to wit: national banking associations located in New York State, and frustrates the purposes for which they were organized; and

c. The said statute unduly discriminates against national banking associations located in New York State and handicaps them substantially in competition with savings banks and savings and loan associations.

Wherefore, defendant demands judgment that the complaint be dismissed.

Dated: New York, New York, June 19, 1950.

Alley, Cole, Grimes & Friedman, Attorneys for Defendant.

(Verified by Arthur T. Roth, President of Respondent Bank, on June 19th, 1950.)

[fol. 13] IN SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NASSAU

BILL OF PARTICULARS

Plaintiffs for their Bill of Particulars respectfully show to the Court and allege:

First. That the defendant herein in violation of the provisions of Section 258, Subdivision 1 of the New York State Banking Law, has continuously since the year 1947 to the date hereof in its banking, financial business and dealings with the public used the term "saving" or "savings" as alleged in paragraph "Fourth" of the complaint in the circumstances as follows:

1. That defendant's bank operated and maintained by the defendant in the Village of Franklin Square, Nassau County, State of New York was and still is housed in two connected buildings which are separated in three sections, viz.,

(a) Defendant has used and still uses the main floor of the corner building for commercial accounts only;

(b) The main floor of the adjoining contiguous building facing Franklin Square was and still is used by the defendant for receiving "savings" accounts. A small opening measuring 5 foot in width connects the commercial and "savings" department of the defendant's bank;

[fol. 14] (c) In the back of the "savings" department aforementioned, the defendant has used and still uses the spaces for its loan department and "family lobby".

That the main floor of the building used for the "savings" accounts aforementioned had and still has many printed

signs located in conspicuous places throughout an area measuring approximately 1,500 feet which includes the word "savings". One large sign is about three feet long and one foot wide hanging from the ceiling reading "savings". In back of this large sign there are six tellers' windows, five of which had and still have glass signs reading "Savings" "Christmas Club" and the sixth widow had and still has a sign reading "Children's Savings".

That the building wherein the defendant maintained and still maintains its "savings" department for its "savings" accounts is constructed and was and still is maintained as and gives the appearance of any modern savings bank in the State of New York. The fact that there was and still is a large circular counter in the middle of the floor with the sign that reads "new accounts" tends to support the inescapable conclusion that it is a savings bank and operated as such. Moreover, there was and still is a large conspicuous sign over a teller's window in the "savings" department with the following advertisement:

"2% on savings accounts between \$100 and \$1,000
1½% on balances over \$1,000."

2. That on the depositors' counters in the said building [fol. 15] housing the defendant's savings department, the defendant placed for public use and consumption printed handbills and circulars soliciting savings accounts from the public and the printed matter thereof contained the prohibited term "saving" or "savings". The same were in fact distributed to the public in such manner. The text and language of such handbill and circular was contained in Exhibits A and B of plaintiffs' moving papers in a motion heretofore made by the plaintiffs for a temporary injunction herein, now on file with the papers in the above entitled action in the office of the Clerk of the County of Nassau. Such handbill and circular also was distributed by the defendant by including same in defendant's monthly checking account statement to its many depositors. All in all, approximately 14,000 of these handbills and circulars were distributed by the defendant in the manner aforesaid.

3. That on the depositors' counters in the said building housing the defendant's savings department, the defendant

placed for public use and consumption printed deposit and withdrawal slips which contained the word "savings". The text and language thereof is contained in Plaintiffs' Exhibits I and J of plaintiffs' moving papers in a motion heretofore made by the plaintiffs for a temporary injunction herein, now on file with the papers in the above entitled action in the office of the Clerk of the County of Nassau. The same were in fact distributed to the public in such manner.

4. That on the counters in the said building housing defendant's savings department bearing the sign "New [fol. 16] Accounts" the defendant placed for public use and consumption coin savings paper cards to encourage savings on which the word "savings" appeared. The same were in fact so distributed in large numbers to the public in such manner. The text and language of such printed matter is contained in Exhibit K of plaintiffs' moving papers in a motion heretofore made by the plaintiffs for a temporary injunction herein, now on file with the papers in the above entitled action in the office of the Clerk of the County of Nassau. Approximately 20,000 of these coin saving paper cards were printed by the defendant and distributed in the aforementioned manner, in addition to the delivery by hand of the same by the defendant through the Federal Distribution Corp., and/or Peck Federal Distribution Corp., an advertising agency employed by the defendant for such purpose.

5. That at or prior to the opening of defendant's branch bank on June 7, 1950 at Levittown Center, 2943 Hempstead Turnpike, Levittown, Nassau County, New York or soon thereafter, defendant circulated by hand through the Federal Distribution Corp, and/or Peck Federal Distribution Corp. an advertising agency employed by the defendant for such purpose, an envelope containing the printed circulars and/or handbills soliciting savings accounts for the defendant's savings department, upon which was contained the printed term "saving" or "savings". The text and language of such handbills and/or circulars is contained in Plaintiffs' Exhibits IX A to IX K inclusive received and [fol. 17] marked in evidence in defendant's examination

before trial on September 18, 1950. Approximately 15,000 thereof were delivered and circulated to the public in Nassau County, State of New York.

6. That around the middle of June, 1948, the defendant in soliciting savings accounts for its savings department printed and circulated a handbill approximately 15,000 in number to the public at large by delivering to same by hand through the Federal Distribution Corp., and/or Peck Federal Distribution Corp., whereon was contained the prohibited term "saving" or "savings". The exact text and language appears in Plaintiffs' Exhibits 10A, 10B and 10C which were received in evidence in defendant's examination before trial herein.

7. That in the year 1949 the defendant distributed to the public approximately 6,000 copies of its printed annual report of the defendant bank for the year 1948, and wherein was contained the printed term "saving" or "savings". A copy of such annual report referred to is annexed to the defendant's affidavit interposed by the defendant in opposition to plaintiffs' aforementioned motion for a temporary injunction, and which is on file with the papers in the above entitled action in the office of the Clerk of the County of Nassau.

8. That the defendant from time to time since the year 1947 through persons directly employed by the defendant and through advertising agencies orally made direct solicitation of the public in the County of Nassau, State of New York, for savings accounts for the defendant's savings department, and they in making such solicitation were directed by the defendant to use and did use the term "saving" or "savings" or their equivalent.

9. That the defendant solicited savings accounts in printed advertisements in various newspapers as hereinafter stated in paragraph "Second" hereof and included in its advertising matter in such newspapers the word "saving" or "savings" as likewise therein stated.

Second. That since the year 1947 defendant has solicited savings accounts in printed advertisements in various newspapers and included in its advertising matter the word "saving" or "savings" or their equivalent. Such adver-

tisements appeared in the newspapers hereinafter mentioned and at the dates as follows :

1. March 8th or March 10th, 1947, The Long Island Daily Press.
2. March 17, 1947, Nassau Daily Review-Star.
3. March 24, 1947, The Long Island Daily Press.
4. May 7th or May 8th, 1948, Newsday.
5. June 17, 1948, Newsday.
6. January 4, 1949, Newsday.
7. January 5, 1949, Nassau Daily Review-Star.
8. March 29, 1950, Newsday.
9. March 29, 1950, Nassau Daily Review-Star.

[fol. 19] Copies of the aforementioned advertisements and each of them are contained in Exhibits A to H inclusive annexed to plaintiffs' moving papers in a motion for a temporary injunction made by them, now on file with the papers in the above entitled action in the office of the Clerk of the County of Nassau; also copies thereof were received as Plaintiffs' Exhibit I to VIII inclusive in defendant's examination before trial on September 18, 1950.

The aforementioned three newspapers, viz., the Long Island Daily Press, Nassau Daily Review-Star and Newsday were and still are daily publications. In addition thereto, the defendant since the year 1947 to the present date hereof, in soliciting the public for savings accounts for its savings department used newspapers other than the three aforementioned, and employed in its advertising matter the term "saving" or "savings" therein. These other additional newspapers mentioned are The Franklin Square Bulletin, the Levittown Tribune, and the Mid-Island Herald, Hicksville, Long Island, all of which are weekly newspapers.

Third: The acts complained of as alleged in the complaint and amplified by the facts hereinbefore stated violated the provisions of Section 258, subdivision 1 of the New York State Banking Law because the defendant as a national bank had no power to engage in business as a savings bank in the State of New York, and that the defendant by the acts complained of has practiced fraud and deception on the public by sign and representation in advertising [fol. 20] for savings accounts by using the prohibited term

“saving” or “savings” and in the use of such terms in its dealings with the public, the defendant not only committed a public nuisance but usurped the rights and franchises reserved exclusively for savings banks authorized to do business as such in the State of New York under the provisions of Section 258, subdivision 1 of the New York State Banking Law.

Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Plaintiffs.

(Verified by Assistant Attorney General Irving L. Rollins on September 26th, 1950.)

IN SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF
NEW YORK

Present: Hon. James B. M. McNally, Justice.

ORDER CHANGING VENUE—July 14, 1950

A motion made by the defendant for an order directing that the place of trial in this action be changed from the [fol. 21] County of New York to Nassau County, upon the specific and sole ground that the defendant, a national bank established in the County of Nassau may be sued only in the county in which it is established, under the express provisions of the National Banking Act (12 U. S. C. A. § 94) having duly and regularly come on to be heard before me on the 7th day of July, 1950, and Alley, Cole, Grimes & Friedman, Esqs., the attorneys for the defendant, by Norman S. Dike, Jr., Esq., of counsel, having appeared in support of said motion, and the Honorable Nathaniel L. Goldstein, Attorney General of the State of New York, the attorney for the plaintiffs herein, by Irving L. Rollins, Esq., Assistant Attorney General of the State of New York, of counsel, having appeared in opposition thereto, and said motion having been submitted for determination without oral argument,

Now, upon reading and filing the notice of motion herein, dated June 12, 1950, the affidavits of Arthur T. Roth and Sidney Friedman, both respectively sworn to the 12th day

of June, 1950, and a copy of the demand made by the defendant for a change of venue, dated May 29, 1950, thereto annexed as an exhibit, together with due proof of service of each thereof all in support of said motion, and the answering affidavit of Irving L. Rollins, sworn to the 23rd day of June, 1950 and a copy of the defendant's answer herein, annexed thereto as an exhibit, and the affidavit of Irving L. Rollins, sworn to the 2nd day of June, 1950, served by the plaintiffs upon the defendant in compliance with Rule 146 [fol. 22] of the Rules of Civil Practice and read upon said motion as an exhibit, all in opposition thereto, and due deliberation having been had thereon, and upon filing the opinion of the Court, it is

Ordered that the defendant's said motion be and the same hereby is in all respects granted; however, without prejudice to any and all proceedings heretofore had herein and to any and all intermediary orders made and entered in the above entitled action; and it is further

Ordered that the Clerk of the County of New York upon the payment of any fees due him, if any, be and he is hereby directed to forthwith deliver to the Clerk of the County of Nassau all papers filed with him in the above entitled action and certified copies of all minutes and entries relating thereto, for filing, entry and recording by the Clerk of the County of Nassau, in compliance with the provisions of Section 188 of the Civil Practice Act; and it is further

Ordered that the Clerk of the Supreme Court, New York County, be and he hereby is directed and authorized to forthwith deliver to the Clerk of the Supreme Court, Nassau County, the moving papers filed by the plaintiffs herein in support of a pending and undetermined motion made by them, returnable on July 17, 1950, at Special Term, Part I of the Supreme Court, New York County, for an order directing the defendant to appear and submit to an examination before trial as an adverse party, pursuant to the [fol. 23] provisions of Section 288 et seq. of the Civil Practice Act; and to preserve the status quo of said motion, it is hereby directed and

Ordered that the same be and hereby is transferred to the Supreme Court, Nassau County, to be heard and determined by the Justice there presiding, on July 26, 1950 at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel

can be heard, and for said purpose the aforesaid pending and undetermined motion shall be deemed adjourned from the original return date thereof, to wit, July 17, 1950, to July 26, 1950.

Enter,

J. B. M. Mc., J. S. C.

IN SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF
NASSAU

Present: Hon. Thomas J. Cuff, Justice

JUDGMENT APPEALED FROM—June 7, 1951

The issues in this action having been brought on for trial before Mr. Justice Thomas J. Cuff without a jury at a Special Term Part II of this Court held on the 22nd day of January 1951 at the Nassau County Courthouse, Mineola, N. Y., and the issues having been duly tried, and the defendant thereupon at the close of all the evidence having moved for judgment dismissing the complaint, and the said complaint having been dismissed upon the merits, with costs, and the Court having made and filed a decision in favor of the defendant and against the plaintiffs containing a statement of the facts found and the conclusions of law thereon, and directing judgment in favor of the defendant, dismissing the complaint upon the merits, with costs and the defendant's costs having been duly adjusted on notice at the sum of \$96.30:

Now, on motion of Alley, Cole, Grimes & Friedman, attorneys for the defendant, it is

Adjudged and decreed, that the plaintiffs' complaint be and the same is hereby dismissed, upon the merits, and that the defendant, The Franklin National Bank of Franklin Square, recover of the plaintiffs, The People of the State of New York, the sum of \$96.30 costs as taxed, and have execution therefor.

Enter,

Cuff, Justice of Supreme Court.

Granted, June 7, 1951. Chas. E. Ransom, Clerk.

Entered, June 8, 1951. Chas. E. Ransom, County Clerk of Nassau County.

[fol. 25] IN SUPREME COURT, NASSAU COUNTY

SPECIAL TERM—PART II

Case and Exceptions

Mineola, New York, January 22, 1951

Before Hon. Thomas J. Cuff, J.

APPEARANCES

National Goldstein, Esq., Attorney General, by Irving L. Rollins, Esq., Deputy Attorney General, for the Plaintiff.

Alley, Cole, Grimes & Friedman, Esqs., Attorneys for the Defendant, by Charles P. Grimes, Esq., Sidney Friedman, Esq., and Herbert Dannett, Esq., of Counsel.

(Adjourned to January 23, 1951.)

Mineola, New York, January 23, 1951

The Court: Did you want to make an opening?

Mr. Rollins: It would be like carrying coals to Newcastle, I think.

[fol. 26] Mr. Grimes: I shall try not to be long, but I would like to make an opening statement.

The Court: It would be a good idea.

OPENING STATEMENT

Mr. Grimes: The State of New York is asking for a permanent injunction. It is seeking to prevent the defendant, Franklin National Bank of Franklin Square, called the Franklin National Bank, from using the word, "saving" or its plural form "savings" in connection with its business in any way, and from advertising, soliciting or receiving deposits as a savings bank. There was a motion for a preliminary injunction, which was denied by the Supreme Court, New York County, on a technical ground, upon the ground that the action was brought by the Attorney General in the wrong forum. That was sustained. It was also brought on the ground, and also dismissed on the ground that no case had been made out under the law for a preliminary injunction. In this case I do not want anything

I say to indicate in any way that we think there has been a decision on the merits or there has not been. It is entirely for this Court.

We are dealing with a rather peculiar statute which contains more than meets the eye. Section 258, sub-division 1, of the Banking Law provides that no bank, trust company, and by name, National Bank, individual, partnership, unincorporated association or corporation; in other words, [fol. 27] no National Bank or any other type of bank other than a savings bank, or savings and loan association, shall make use of the words, "saving" or "savings", or their equivalent, in relation to its banking or financial business; nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank.

In other words, the first thing one notices about this statute is it sets up a favored, special class savings banks and savings and loan associations, which alone may use the word "saving" or "savings" in or in relation to their banking and financial business. It may strike one who has not gone into the facts, as we have been obliged to, rather peculiar that this action should have been brought at all. At first blush it sounds as though there was a great deal to do about one word, the word "savings", whether used in the single or plural form. I can assure you that before we are through with our proof the importance of those words, "saving and savings", will become very significant.

On the importance of those words we feel obliged to put on witnesses, and to adduce a very considerable amount of proof, to show the restriction by the statute of New York of the words "saving" and "savings" to savings banks and savings and loan associations is an unconstitutional application of its sovereign power, for the reason if a National [fol. 28] Bank, such as the Defendant here, is not authorized to use those words, which, as we shall show, are of the utmost importance in our business, there is an unwarranted, unlawful and unconstitutional interference with our rights as a National Bank, rights granted by the Federal Government, and the statute must be held void in so far as any application is claimed as to us.

The complaint in this case is of a rather vague nature. It charges we have used the word "savings" in, and in

connection with our banking business, in our signs and advertising. There is no question about that. We have, we do, and we intend to continue to do so under what we claim is a Federal grant of power unless and until prevented by the action of this or some other Court of competent jurisdiction.

There is, however, a second part to this case, in which they say we are palming ourselves off as a savings bank—those are not the exact words, but that, I think, is a fair shorthand expression of what they claim we did. Probably (and this is pure speculation, because we do not now know) they are making that contention because of a case which appears in our brief and their brief, with which you are no doubt familiar, in which the Court of Appeals said in substance that a charge under the statute will not properly lie [fol. 29] against a commercial bank for using the same forms and doing business in the same manner as a savings bank; that such charge will only lie where there is some form of deception practice on the public. We were not sure when we received their bill of complaint just what the whole scope of the allegations was, so we asked for a bill of particulars in which they particularize in the following manner: They charge that by the use of our forms as we do, and by the use of advertising including the word “savings”, and by the very structure and nature of our building, we have done the following things: we have deliberately committed fraud; we have deliberately, even by our architecture, undertaken to deceive the public; that we have usurped the right to a franchise granted by the State of New York exclusively to savings banks; and that we have committed a public nuisance, in some manner not at all clear to me, except that I gather from this plainly they are going to ask you to abate us.

These are very serious charges; they are charges unpleasant to hear; they are charges which, as I suggested yesterday, will be met head-on, and will be met by the testimony of a number of reputable witnesses on all points.

Thus, a number of issues of fact are raised merely by that aspect of the complaint, and in addition a number of issues of fact are squarely raised by the answer which we inter- [fol. 30] posed based upon an unbroken line of cases begin-

ning with the great case of *McCulloch versus Maryland*. With your Honor's permission I would like to discuss that case somewhat at length because everything of substance which is before this Court in this case in my opinion was before the great Judge Marshall in *McCulloch versus Maryland*, for there like here, a State acting in behalf of a special class endeavored to interfere with the power of the Federal Government in what many lawyers at that time felt the Federal Government had under its constitution.

OPENING STATEMENT

Mr. Rollins: The history of the National Bank is not in issue here, because any such history is but a smoke screen invoked in this court to cover up acts of which we complain. There is no question any bank doing business in this State or elsewhere by virtue of being a bank, has a right to receive deposits, be it a savings bank, National bank or any other kind. We do not say a National Bank cannot accept deposits and pay interest thereon. In the *People of the State of New York against Binghamton Trust Company*, 139 N. Y. 185, the Court specifically said it was not intended by the statute, Section 258 of the Banking Law, the subject of this case, to create a monopoly as to business methods in favor of State banks or any other bank. The Court did say the purpose of the statute was to protect the public against deception or pretense of a bank that it is a savings bank. The Federal Statutes creating the defendant National bank, made it a citizen of the State of New York, and subjected all National Banks to rules and regulations, and the law of [fol. 31] each particular State. Same granted power to any State, to regulate its business except in minor particulars not applicable here.

The United States Supreme Court held that the business of a savings bank is a matter of state regulation. We say, and agree with counsel, if there is a Federal statute in existence today, which grants them express power to use the word "saving" or savings", then same will be controlling. However, we deny that there is such a Federal statute in existence. It is settled law today that a Federal statute supersedes a conflicting State statute. I say this, there is no such statute and they know that, so they come into court

and say it must be implied. But as I have pointed out in my memorandum, in which I cite the leading case in the United States Supreme Court, with which I believe you are familiar, i. e., *First National Bank of St. Louis vs. Missouri*, 263 U. S., it appears that the power to use the words "saving" or "savings" is not granted to a National Bank, by the National Bank Act.

If it withheld those powers, if they were not granted, as we contend, they were withheld by the National Banking and Federal Reserve Acts. No such power may be implied because of the rule (reading). I say to you, only if we stretch the statute beyond its meaning, can we say they have a right to advertise their wares. We say further they have a right to say they receive deposits, but not by use of the word "saving" or "savings". Only if you stretch that statute beyond its meaning, and put therein language that was withheld by the Federal statutes only then can you conclude that Section 258 has been superseded. I say [fol. 32] evidence if offered in this case, showing motives for bringing this action, would not be material, nor competent in this trial. I think I point that out at page 31 of my brief. The reasonableness of the New York statute,—as my memorandum points out to you Honor,—in its present state, and whether it should be continued is not before the Court. The Supreme Court of the United States, as I have stated in my memorandum in *Powell v. Pennsylvania*, 127 U. S. 678, at page 686 pertinently said (reading):

Mr. Rollins: I ask your Honor to take judicial notice of all banking business methods.

COLLOQUY

The Court: Was there some agreement or concession you thought ought to be on the record?

Mr. Grimes: He asked your Honor to take judicial notice of all banks and banking business, in which we heartily concur.

The Court: I do not think I can take judicial notice of the banking business.

Mr. Rollins: I will start reading from the examination before trial of the defendant, Franklin National Bank of Franklin Square, conducted on September 18, 1950 at the

office of the defendant bank here in Nassau County, specifically the deposition——

The Court: Are you going to read the entire deposition?

Mr. Rollins: Yes.

The Court: Do you have any copies of it?

Mr. Rollins: Specifically the deposition of Arthur T. Roth, defendant's president, in pursuance of an order made by Justice Stoddart, dated July 26, 1950, made in this action and entered in the office of the Clerk of the County of Nassau, July 26, 1950.

[fol. 33] The Court: If you have a copy I would like to have it. If you are going to read the deposition, offer it in evidence and it will be marked, and the reporter will be able to have it for his record.

Mr. Rollins: I offer in evidence deposition referred to.

Mr. Grimes: As long as it is the original, no objection at all.

(Paper received in evidence and marked Plaintiff's Exhibit 1 reproduced hereunder, pp. 33-54; and marked without number. See p. 35.)

The Court: Put a notation that the exhibits offered by the plaintiff will continue in rotation commencing with Arabic 1. Proceed.

Direct examination.

By Mr. Rollins:

Q. What is your name?

A. Arthur T. Roth.

Q. Where do you reside, sir?

A. 344 Harvard Avenue, Rockville Centre, Long Island, New York.

Q. Are you an officer of the Franklin National Bank of Franklin Square, the defendant in this action?

A. Yes, I am.

(Mr. Dannett takes the stand as a witness.)

Q. What officer are you?

A. President of the bank.

Q. How long have you been such president?

A. Approximately four years.

Q. And are you also a member of the Board of Directors of the defendant?

A. Yes, I am.

Q. How long have you been such director?

A. Approximately ten years.

[fol. 34] Q. And during the last ten years have you been actively engaged daily in the affairs of the defendant bank?

A. Yes, I have.

Q. And are you conversant with its affairs?

A. I am.

Q. During the last ten years have you held any other office in the Franklin National Bank of Franklin Square other than president?

A. Yes, that of executive vice-president and also that of cashier.

Q. You have held these respective offices of the defendant bank continuously during the last ten years?

A. I have.

Q. Since the year 1947 and continuously to the present date hereof, did the defendant bank have a savings department?

A. Yes, we have.

Q. And that answer goes for at least the year 1947?

A. That is correct.

Q. Since the year 1947 and continuously to the present date, did the defendant bank employ any advertising media to solicit saving accounts for its savings department?

A. Yes.

Q. Will you please enumerate the mode and character of such advertising media?

A. Through the newspapers, direct mail, hand bills and house to house solicitation.

Q. When the defendant advertised for savings accounts for its savings department in the newspapers as mentioned by you, did the defendant advertise in three newspapers, to wit: The Nassau Daily Review-Star, Long Island Press and Newsday, three separate newspapers?

A. Yes, we did.

Q. I show you a clipping of an advertisement appearing in the Long Island Daily Press on March 10, 1947,

[fol. 35] and ask you whether or not such advertisement was inserted in such newspaper by the defendant on March 10, 1947?

A. According to our records, that ad. appeared on March 8, 1947.

Q. And was such advertisement authorized?

A. Yes.

Q. And did such advertisement appear in the Long Island Daily Press either on March 8, 1947 as you say or on March 10, 1947 as we claim?

A. Yes.

Q. And at that time was the defendant known by the name of the Franklin Square National Bank?

A. Yes.

Mr. Rollins: I offer the advertisement referred to in evidence.

The Court: Mark it.

(Paper received in evidence and marked Plaintiff's Exhibit 1.)

Q. I show you a clipping from the Nassau Daily Review-Star dated March 17, 1947 and ask you whether or not the advertisement appearing therein was authorized by the defendant?

A. Yes, it was authorized by the bank.

Q. And did such advertisement appear in such newspaper on the day mentioned when circulated by the newspaper?

A. Yes.

Q. And did the defendant pay the Nassau Daily Review-Star for such advertisement?

A. Yes.

The Court: Mark this deposition in evidence without any number.

(Paper received in evidence and marked Plaintiff's Exhibit 2.)

[fol. 36] Q. I show you a newspaper clipping from the Long Island Press published therein on March 24, 1947 and ask you whether or not that is an authorized advertisement of the defendant?

A. Yes.

Q. And did such advertisement appear in such newspaper on March 24, 1947?

A. Yes.

Q. Did the defendant bank pay the Long Island Press for such advertisement?

A. Yes.

Mr. Rollins: I offer the newspaper clipping referred to in evidence.

The Court: Mark it.

(Received in evidence and marked Plaintiff's Exhibit 3.)

Q. I show you a newspaper clipping appearing in Newsday of its issue on May 8, 1948 and ask you whether or not such advertisement was placed by the defendant with such newspaper?

A. According to our records, this ad. appeared on May 7, 1948.

Q. Was it authorized by the defendant?

A. Yes, it was.

Q. Did the defendant pay Newsday for such advertisement?

A. Yes.

Q. Did such advertisement appear in Newsday either on the 7th or 8th of May, 1948?

A. Yes.

Mr. Rollins: I offer the clipping referred to in evidence.
The Court: Mark it.

(Received in evidence and marked Plaintiff's Exhibit 4.)

[fol. 37] Q. I show you a newspaper clipping showing an advertisement of the defendant in Newsday, appearing on June 17, 1948 and ask you whether or not the same was inserted and circulated by the newspaper on June 17, 1948 by the defendant's direction?

A. Yes.

Q. Did the defendant pay for such advertisement to Newsday?

A. Yes.

Mr. Rollins: I offer the newspaper clipping referred to in evidence, just the clipping itself.

The Court: Mark the clipping.

(Received in evidence and marked Plaintiff's Exhibit 5.)

Q. I show you a newspaper clipping showing an advertisement of the defendant in Newsday on January 4, 1949 and ask you whether the same was inserted by the defendant's direction in such newspaper on such day?

A. We have no record of this ad. appearing in Newsday, but we do have a record of a similar ad. appearing in the Nassau Daily Review-Star on January 5, 1949.

Q. Is there any mark of identification to show in what paper this particular ad. to which I now refer appeared?

A. Yes, the page number is that of Newsday.

Q. Do you question the date of January 4, 1949?

A. No, I have no reason to.

Mr. Rollins: I offer the advertisement referred to in evidence.

The Court: Mark it.

(Received in evidence and marked Plaintiff's Exhibit 6.)

[fol. 38] The Court: Let it appear of record the underlining of the words, "savings account" was not in the advertisement, and that that was done by counsel to draw the Court's attention.

Mr. Rollins: That is right. I meant to mention that fact. I just noticed it myself. They admit that.

The Court: I know, but we must have the record. When exhibits are printed those things come up as if they were printed originally. You have a right to underline it, but it is our obligation to anybody else to show what is the record.

Q. I show you a newspaper clipping showing the advertisement of defendant in Newsday on March 29, 1950 and ask you whether or not the same was inserted by the defendant's direction?

A. Yes, it was.

Q. Did this advertisement appear in Newsday on March 29, 1950?

A. Yes, it did.

Q. Did the defendant pay Newsday for such advertisement?

A. Yes.

Mr. Rollins: I offer the newspaper advertisement referred to in evidence, calling the Court's attention the underlined portion was done by counsel.

The Court: That is so with respect to at least two other exhibits. I noticed the word "savings" underlined.

Mr. Rollins: May I have the record indicate that I did underline the word "savings."

(Paper received in evidence and marked Plaintiff's Exhibit 7.)

[fol. 39] Mr. Rollins: May I call your Honor's attention to this Exhibit 7, while it uses "savings" at the beginning, it attempted to equivocate and start to put the word "thrift" thereunder, thrift account, so they used it interchangeably.

Mr. Grimes: I move the remarks be stricken from the record. Irrelevant.

The Court: I do not mind those observations as you go along.

Mr. Grimes: I withdrew the motion.

The Court: In this exhibit, this is the only part that has any bearing on the acts, is it not?

Mr. Rollins: Yes, on the top, savings.

Q. I show you a newspaper clipping of the Nassau Daily Review-Star of March 29, 1950 and ask you whether or not the defendant's advertisement appearing therein was inserted by the defendant's direction?

A. Yes, it was.

Q. And did the defendant pay the Nassau Daily Review-Star for such advertisement?

A. Yes, we did.

Q. And did such advertisement appear in the Nassau Daily Review-Star on March 29, 1950?

A. Yes.

Mr. Rollins: I offer the newspaper clipping referred to in evidence. I have given counsel photostatic copies of all of these in advance of trial, so they have photostats. That is the reason in the stipulation of counsel I need only mention what date they appeared on.

(Received in evidence and marked Plaintiff's Exhibit 8.)

[fol. 40] The Court: This looks like the same copy.

Mr. Rollins: Practically the same.

The Court: Different newspapers.

Q. Did the defendant between the year 1947 to the present date hereof use any other newspapers other than the three mentioned, that is the Long Island Daily Press, Nassau Daily Review-Star and Newsday to advertise for savings accounts using the term, "saving" or "savings"?

A. Yes, I believe we did.

Q. What newspapers were they?

A. The Franklin Square Bulletin, the Levittown Tribune and the Mid-Island Herald, Hicksville, Long Island, all of which are weekly newspapers.

Q. Now, these papers, the Long Island Daily Press, the Nassau Daily Review-Star and the Newsday, are they newspapers which are published daily?

A. Yes, they are.

Q. Do you know the circulation of all these newspapers or any of them numerically?

A. That I do not know.

Q. At the time or prior to the advertisements appearing in Plaintiff's Exhibits 1 to 8 inclusive, did the newspapers wherein such advertisements appeared, represent to you the circulation of their respective newspapers?

A. No, they did not.

Q. Did you make any inquiry of anybody else from the defendant bank?

A. We knew they were substantial and that they covered the area we wanted them to cover.

Q. What area do you refer to?

A. Nassau County.

[fol. 41] Q. That's in the State of New York?

A. That is right.

Q. Now, in making direct solicitation for savings ac-

counts, did the defendant use an advertising agency or person directly employed by the bank?

A. At times we used an advertising agency and at other times Mr. Green, our Vice-President in charge of advertising and publicity, handled it himself.

Q. What is the first name of Mr. Green?

A. Charles W. Green.

Q. Did you tell the agency and employees so employed to solicit savings accounts for the defendant to use the term, "saving" or "savings" or their equivalent?

A. Yes, we did.

Q. And did they to your knowledge use such terms?

A. Yes, they did.

Q. And such terms were used with the knowledge, direction and consent of the defendant corporation?

A. Yes, it was.

Q. What was the exact address of the defendant bank at Franklin Square?

A. 315 Hempstead Turnpike, Franklin Square, Long Island, Nassau County, New York.

Q. Has the defendant bank a branch in Levittown Centre, at 2943 Hempstead Turnpike, Levittown, New York?

A. Yes, we do.

Q. When did the defendant open such branch?

A. June 7, 1950.

Q. At or prior to the opening of the defendant branch at Levittown Centre, 2943 Hempstead Turnpike, Levittown, New York, or soon thereafter, did the defendant circulate through the mail in Nassau County printed matter which I now show you contained in an envelope?

A. Yes, we did circulate these items, however, they were [fol. 42] not sent by us through the mail but delivered by hand by the Peck Federal Distribution Corp.

Q. What is their address?

A. Downtown New York.

Mr. Rollins: I offer these in evidence as one exhibit and request the Court at this time they be marked Plaintiff's Exhibits 9-A to 9-K inclusive.

The Court: All right. Mark the envelope.

(Envelope received in evidence and marked Plaintiff's Exhibits 9-A to 9-K inclusive.)

Mr. Rollins: And its contents?

The Court: I want to show what it is. Exhibits marked 9-A to 9-K contain ten pieces of paper which would seem to be literature, envelopes, deposit slips, various forms which treat with the carrying on of a savings account with the bank.

Q. How many of those envelopes containing these various items marked 9-A to 9-K inclusive were sent to individuals in Nassau County?

A. I believe approximately 15,000 were delivered to individuals.

Q. Did the defendant bank use such media of advertisement with respect to its main office here in Franklin Square?

A. No, we did not.

Q. Now, in its handbills circulated by the defendant in soliciting advertisements for its savings accounts for the defendant bank, did the term "saving" or "savings" or its equivalent appear therein?

A. Yes.

Q. Have you got one of those forms?

[fol. 43] Mr. Rollins: May the record indicate the witness hands Mr. Rollins an envelope containing two papers with printed matter.

Q. Is this the handbill circulated by the defendant?

A. Yes, it is.

Q. Was this one of the handbills circulated by the defendant?

A. Yes, it is.

Q. Would you place the date when such handbill was circulated and delivered?

A. Around the middle of June, 1948.

Q. About how many such circulars were delivered?

A. Approximately 15,000.

Q. And where were they so circulated?

A. In the Franklin Square, Elmont area.

Q. That's in Nassau County, State of New York?

A. Yes.

Q. Were they delivered by hand?

A. Yes.

Q. Did the defendant use any advertising agency or other means of delivery?

A. The Federal Distributing Corp.

Q. Were these circulars to which I refer contained in this envelope?

A. Yes, they were.

Mr. Rollins: I now offer the envelope and the two printed papers referred to as Plaintiff's Exhibits 10-A, B and C.

(Papers were received in evidence and so marked.)

The Court: Note on the record the envelope contains two papers, being printed forms issued by the defendant bank.

(Adjourned to January 24, 1951 at 11 A. M.)

[fol. 44] Mineola, New York, January 24, 1951.

Trial Continued

The Court: All right, now, let us go along.

(Mr. Rollins continued reading deposition as follows:)

Q. I show you an annual report of the defendant bank for the year 1948 and ask you whether the defendant printed and circulated this annual printed report?

A. Yes, we did.

Mr. Rollins: I offer the same in evidence.

Mr. Grimes: No objection.

The Court: Mark it.

(Received in evidence and marked Plaintiff's Exhibit 11.)

Mr. Rollins: For the purpose of the record and an aid of the Court, I direct your Honor's attention to pages 6, 11, 13, 15, 17 and 32 of the report.

The Court: Let me look at them. You have underlined the word, "to save".

Mr. Rollins: Yes.

The Court: What is objectionable, annex between what would be mother and child?

Mr. Rollins: You notice the sign starting with S. A. It will be brought out on another document.

[fol. 45] Mr. Grimes: Something about mother and child, S. A. We will concede it is savings.

The Court: That is just a little sign on a desk.

Mr. Rollins: Page 32. Will your Honor permit me, I would like to read from that exhibit, that is exhibit 10. I read now from the first paragraph of page 6, exhibit 11. "When the term "we" in quotation marks is used to signify banks ramified money transactions, we are very conscious of the fact——

The Court: Wait a minute. Was that your own statement?

Mr. Rollins: What I am reading from exhibit 11, bank's own report.

The Court: All right. I want to make sure this is a quotation.

Mr. Rollins: This is a quotation. "When the term "we" word "we" is placed in quotation in this report, is used to signify banks ramify many transactions we are very conscious of the fact that the majority is not our money. Where then does it all come from? The great majority of it comes from the so-called little man. He is the fellow, who in addition to living on a high standard still has something left to save or invest for future needs. He is the typical American, for almost nowhere else in the world today does this condition exist."

Now, from page 11, which your Honor has noted, and I am reading from exhibit 11. Savings, bold type. In this exhibit it states——

[fol. 46] The Court: Just read it.

Mr. Rollins: "Savings. We had 4,096 thrift accounts at the end of 1944, totaling \$7,423,000. These figures this past year were 19,561 accounts were \$13,691,000, and then in words in dollars." In other words, the figure I just gave you has dollar significance and it is in blank figures, and it follows with the word, in dollars.

The Court: After the word dollars, put a quote.

Q. Did the defendant circulate Plaintiff's Exhibit 11 to the public?

A. Yes, we did.

Q. About how many copies?

A. About 6,000.

Q. And that was all during the year 1948?

A. No, during the year 1949 because this is a report as of the year ending December 31, 1948.

Q. Now, the bank of the defendant maintained at Franklin Square, is it divided into two departments, a commercial department and a savings department?

A. No, that is not so.

Q. Is there any portion of the bank used exclusively for saving accounts?

A. Yes.

Q. What portion of the building is used for savings accounts?

A. A counter which is located in the family lobby of the bank.

Q. And has that portion of the bank used for savings accounts got a separate entrance and exit?

A. No.

Q. Now, this bank of the defendant at Franklin Square, does it consist of two connecting buildings?

A. No.

Q. Would you say the bank is one building?

A. I would say the bank is one building.

[fol. 47] Q. Was any portion of the bank there erected prior to any other additions?

A. We have had some nine or ten major additions, that is, alterations to the bank since 1929.

Q. Now, when was the portion of the bank wherein the savings accounts are maintained added to the bank?

A. During the years 1946 and 1947.

Q. Since the year 1947 to the present date hereof, did the portion of the bank wherein savings accounts are received have signs located therein including the term saving or savings?

A. Yes.

Q. About how many such signs are there?

A. There is one sign which reads, savings and there are six other signs over each teller's window which read, savings—line—Christmas Club.

Q. Well, these signs to which you make reference, how long have they been there?

A. Since about July 1, 1947.

Q. I show you Plaintiff's Exhibits 7 and 8 in evidence and ask you whether or not the defendant had printed and placed in its savings department for circulation to the public handbills identical in text?

A. These were in both the family lobby and the business lobby of the bank.

Mr. Rollins: May I at this time call your Honor's attention those were exhibits received in evidence as 7 and 8, showing the text of the publication in the newspapers mentioned.

The Court: All right.

Q. I see, and when you say this you mean they were printed by the defendant and placed for the persons dealing [fol. 48] ing with the bank?

A. And they were on counters in both the family lobby of the bank and the business lobby of the bank.

Q. When you say family lobby, what do you mean by family lobby?

A. I mean the lobby in which the savings accounts counter is located, and also where we handle the deposits and withdrawals on special checking accounts. Would you want me to enumerate the twenty odd services?

Q. No, you don't have to.

A. We open new accounts for both the savings department, Christmas Club and for special checking accounts, we have our consumer credit department located in the family lobby and there they handle and process applications for automobile loans, home modernization loans, personal loans of various types and we have in the family lobby dealers exhibits, we sell bank money orders, we handle Christmas Club accounts there, we also sell travelers checks in the family lobby, we have our children savings account located there, and we sell U. S. savings bonds, all of these are in the family lobby. We handle the purchase and redemption of U. S. savings bonds in the family lobby, we handle foreign mail and cable transfers in the family lobby, we have a bill paying service in the family lobby, we sell cashiers checks in the family lobby, we handle foreign money exchange transactions in the family lobby, we handle the purchase and sale and exchange of securities in the family lobby. We accept mortgage payments in the family lobby and we have counters and all the necessary facilities for the handling of all of these services enumerated in the family lobby. All of these are located in the family lobby and we estimate that

[fol. 49] the percentage of area devoted to the savings activities is approximately 15 to 20 percent and the balance is devoted to non-savings functions enumerated above.

Mr. Rollins: May I call your Honor's attention at this time that the words "savings activities" which are limited to 15 to 20 percent is not stated in the area. I just want to point that out to you.

Q. Now, coming back to this circular that I have reference to, did you print this particular circular and place it in the family lobby?

A. Yes, we did.

Q. About how many in number?

A. We printed approximately 15,000 copies of this circular.

Q. During what period of time—approximately on what date?

A. Sometime around March, 1950.

Q. And they were placed as you say in the various parts of the bank in the family lobby and the commercial part of the bank?

A. Yes, on—in the family lobby and in the business lobby and we also included the circular in our monthly checking account statements.

Q. And this circular was placed so that the public could pick it up by themselves?

A. Yes, that is correct.

Q. And all of the 15,000 have been used up?

A. Most of them were distributed but I believe that we had a few thousand remaining.

Q. About how many would you say remaining?

A. About 1,000.

Mr. Rollins: I offer the circular referred to in evidence.

[fol. 50] Mr. Grimes: No objection.

The Court: Mark it.

(Received in evidence and marked Plaintiff's Exhibit 12.)

The Court: This is that same circular?

Mr. Rollins: That was included in the advertisement, that is published advertisement in newspapers, just a repetition.

Q. I show you a deposit and withdrawal slip taken from

your savings department and ask you whether or not those are the forms of deposit and withdrawal slips authorized and used by the defendant bank since 1947?

A. Yes, they are.

Mr. Rollins: I offer these in evidence as Plaintiff's Exhibits 13-A and B respectively.

Mr. Grimes: No objection.

The Court: Mark them.

(Two papers received in evidence and marked Plaintiff's Exhibits 13-A and 13-B.)

Q. And these Plaintiff's Exhibits 13-A and 13-B, were they located on the depositors' counters for the use of the customers as they came in?

A. Yes, they were.

Q. And since on or about the year 1947, in the defendant's bank were these—these coin saving paper cards printed and distributed by the defendant?

A. We only got these up in 1950 for the first time.

[fol. 51] Q. And were they distributed to the public?

A. Yes.

Q. How many in number would you say?

A. Approximately 20,000.

Q. And how were they distributed?

A. Hand distributed through the Federal Distribution Corp.

Q. And were they also distributed through the counters maintained at your bank's savings department?

A. Yes, in both the family lobby and the business lobby.

Q. And the family lobby, of course, includes the savings department, is that it?

A. Yes, that is correct.

Mr. Rollins: I offer the cards referred to in evidence.

Mr. Grimes: No objection. These are words underlined here.

The Court: All right. Mark it.

(Paper received in evidence and marked Plaintiff's Exhibit 14.)

The Court Let it appear again on the record that the underlining in this exhibit as in other exhibits was not in

the original text, but for convenience has been added by counsel for the plaintiff.

Mr. Rollins: Have you got the originals?

Q. I show you copies of letters dated March 25, 1947, April 3, 1947 and April 16, 1947, addressed to your attention as the president of the Franklin Square National Bank, from the Deputy Superintendent of Banks of the State of [fol. 52] New York, and ask you whether or not you received the original thereof?

A. Yes, we did receive the originals of these letters.

Q. Did you read them, sir?

A. Yes, I did.

Mr. Rollins: I offer these letters referred to in evidence to be marked Plaintiff's Exhibits 15A, B and C.

Mr. Grimes: No objection.

The Court: Mark them.

(Received in evidence and marked Plaintiff's Exhibits 15-A, B and C.)

Mr. Rollins: May the record show counsel for the defendant stipulates that each of Exhibits 15-A, B and C were signed by Charles Schoch, Deputy Superintendent of Banks of the State of New York.

Mr. Grimes: That is a fact. We so concede.

Q. Did the defendant bank since the year 1947 limit the amount of the savings accounts maintained by its depositors?

A. No, we have not.

Q. Since the year 1947 has the defendant bank had depositors whose savings exceeded the sum of \$5,000?

A. Yes, we have.

Q. Do you still have such depositors?

A. Yes, we do.

Q. Approximately about how many depositors has this bank exceeding the sum of \$5000 each?

A. Approximately 582 such accounts.

Q. Could you tell me the maximum amount of savings that any of the depositors have?

A. As of the date when the action was instituted, that is

[fol. 53] on or about May 12, 1950, the largest depositor in our savings department had a deposit of \$36,613.97.

Q. How many depositors did the bank have at the time this action was instituted, that is, May 12, 1950, whose savings accounts exceeded the sum of \$7500?

A. Approximately 137 accounts.

Q. About how many savings accounts depositors did the defendant bank have on May 12, 1950 whose accounts exceeded the sum of \$10,000?

A. Approximately 65 such accounts.

Mr. Grimes: Do you have with you the replies which were made by the bank to the three letters?

Mr. Rollins: I have some letters here. I will let you examine my whole file if — want to. This was pending long before the administration of Mr. Goldstein, the subject of correspondence between the Comptroller of the Currency and with his predecessor, Mr. Bennett, and there has been some attempt to try to stop this practice. I know that.

The Court: We are getting far afield. Counsel simply wants to know do you have the bank's answer.

Mr. Rollins: I do not know what file I have. I will give Mr. Grimes whatever file I have.

The Court: So far as you know——

Mr. Rollins: No.

The Court: You have not seen them?

Mr. Rollins: No.

Mr. Grimes: Would you object to our putting in copies [fol. 54] of the replies if I see fit to do so?

Mr. Rollins: I would have to verify it by the Superintendent of Banks.

The Court: If you think they are important, you offer copies later on.

Mr. Grimes: Will you accept these?

ARTHUR R. SEATON, SR., called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rollins:

Q. Where do you reside?

A. 111-39 204th Street, Hollis, New York.

Q. Mr. Seaton, are you connected with the Department of Banks of the State of New York?

A. I am.

Q. In what capacity?

A. State Bank Examiner.

Q. How long have you been connected with or employed by the State Banking Department?

A. Approximately twenty-five years.

Q. Is your position there an exempt position or in the competitive class?

A. Competitive class.

Q. Were you at one time Deputy Superintendent of Banks of the State of New York?

A. I was Deputy Superintendent of Banks of the State of New York.

Q. Between what years?

A. Between 1930 and 3 or 4.

Q. Your duties as a Bank Examiner, what do they [fol. 55] entail?

A. Examination of institutions under control of the Superintendent of Banks.

Q. Are your instructions in writing under the signature of the Superintendent of Banks of the State of New York?

A. They are.

Q. Have you got those instructions with you?

A. I have an identification card.

Q. Do they include your instructions?

A. Yes. Do not forget to give it back to me, though.

Mr. Rollins: I offer it in evidence.

Mr. Grimes: No objection.

The Court: Mark it.

(Received in evidence and marked Plaintiff's Exhibit 16.)

The Court: This is just his authority to act in case anybody asked him. Go ahead.

Q. Did you in the line of duty and the instructions of the Superintendent of Banks visit the place of business of the defendant, Franklin National Bank of Franklin Square in about January of 1950?

A. I did.

Q. Will you tell the Court on what dates you visited those banks and what you observed?

A. I think you have the dates. It was April, was it not?

Q. April instead of January, 1950?

A. April 6, 7, 10 and 11.

Q. What year?

A. 1950.

Q. Will you tell the Court exactly what you observed?

A. I will read my report.

Q. Before you do that, give us the address of the defendant bank, where you went.

[fol. 56] The Court: Would it save time and your record to put the report in evidence after you look at it?

Mr. Grimes: I never looked at it.

The Court: There is only one defendant?

Mr. Rollins: Yes. May I say, bank.

The Court: The defendant. As you are reading that have in mind you are not subscribing to the correctness of it, or the conclusions in it, anything like that, and it is only being offered in lieu of having the witness say those words.

Mr. Grimes: I understand.

The Court: And you can cross-examine. Under those conditions Mr. Grimes makes no objection to the report being received in evidence.

By Mr. Rollins:

Q. Did you make a report to the Superintendent after you investigated at the times that you have mentioned?

A. I did.

Q. Did this report reflect truly, accurately, your observation and the result of your investigation?

A. It does.

Mr. Grimes: Is that the report you are referring to?

Mr. Rollins: The same report that I hold in my hand.

Mr. Grimes: That report reflects truly and accurately his observation?

Mr. Rollins: Yes.

[fol. 57] Q. Did you make this report to the Superintendent of Banks, William A. Lyon?

A. I did.

Q. Gave him the original notes?

A. I did.

Mr. Rollins: I offer it in evidence.

The Court: You offer it to be marked in evidence in lieu of having the witness testify as to the facts contained in it?

Mr. Rollins: Yes.

The Court: To which Mr. Grimes makes no objection as long as it is received under the conditions enumerated by the Court a little while ago. Mark it for the convenience of everybody.

(Paper received in evidence and marked Plaintiff's Exhibit 17.)

Q. Were exhibits 13 and 14 the part of this report that you submitted to the Superintendent of Banks, and to which reference is made in Plaintiff's Exhibit 17?

A. They were.

Mr. Grimes: This is a part of the report?

Mr. Rollins: Yes.

The Court: Could I interrupt a moment just to have a consent put on the record, in the event the Court so desires? Would there be any objection by either side if the Court inspected the premises?

Mr. Grimes: I intended fully to move the Court to inspect the property.

The Court: You have no objection to that?

[fol. 58] Mr. Rollins: I might say as I stated yesterday I want to introduce photographs of the entire bank from every angle.

Mr. Grimes: Nevertheless, I shall still move the Court to inspect the premises.

Mr. Rollins: If the Court wants to do it.

The Court: All right. These are just the same exhibits

we had before, except Mr. Seaton makes them part of his report. All right.

By Mr. Rollins:

Q. On September 18, 1950, did you, in the presence of Mr. Roth and counsel for the defendant in this action, have a photographer make photographs of the outside of the building and the inside of the building?

A. I did.

The Court: Suppose you offer the photographs in evidence and see if there is any objection.

Mr. Rollins: May I ask Mr. Seaton, with the Court's permission, whether the physical condition which you found in April was the same as on September 18, 1950?

The Witness: They were.

Q. The physical conditions there were the same on September 18, 1950 as prevailed in April, 1950?

A. That is right.

Mr. Rollins: I might say for the record I gave to counsel [fol. 59] for the defendant in this action a copy of each one of these photographs, which I now offer in evidence.

The Court: I must pause long enough to commend you for that. Lawyers should always do that.

Mr. Rollins: Thank you. May I ask each one of these photographs be marked separately, because I am going to refer to each one of them.

The Court: They are offered in evidence. Mark them, or any you want marked.

Mr. Grimes: No objection to the introduction of any of those photographs. I am taking counsel's word those are photographs made that day, and I am sure his word is good and we consent as to all of them going in evidence.

The Court: All right. Put them in the order you want them.

By Mr. Rollins:

Q. May I ask you, Mr. Witness, to put them in chronological order, because you know your way around better than I do.

A. (No answer).

(Photographs received in evidence and marked Plaintiff's Exhibits 18-32 inclusive.)

Mr. Rollins: May I have a detailed word description?

Q. These photographs, Plaintiff's Exhibits 18-32 inclusive, [fol. 60] sive, represent the bank, of its main office?

A. Main office only, yes.

Q. Where is it situated?

A. Corner Hempstead Turnpike and James Street. The address is—

Q. 315 Hempstead Turnpike in the Village of Franklin Square, is that right, County of Nassau, State of New York?

A. County of Nassau, State of New York.

Q. Do you know its location, that is, the bank's location with respect to the points of the compass?

A. It is on the southwest corner of Hempstead Turnpike.

Q. How many buildings does this bank consist of, if you recall?

A. Two.

Q. I show you Plaintiff's Exhibit 18 and ask you whether or not this represents the outside of the defendant's main branch?

The Court: Suppose you try to shorten this up if you can. Put the question what does it show as to each exhibit? I think you talked enough to the witness for him to know what you want.

The Witness: It does.

By the Court:

Q. What does that picture show? We will begin that way.

A. This is a picture of the Franklin National Bank situated—

Q. We know that. Exterior of the bank?

A. Exterior of the bank.

By Mr. Rollins:

Q. Where is the savings department located on that Exhibit 18? Will you point out to the Court?

[fol. 61] A. West of the main building, west of the building from the corner.

Q. Is there a separate entrance, that is, entrance, that is, entrance and exit from the savings department to the street?

A. There is.

By the Court:

Q. Is that for the public?

A. For the public, yes.

By Mr. Rollins:

Q. You have used it yourself?

A. I have.

Q. That corner building, what business is conducted there?

The Court: You have two corners.

Q. Those two corners, that is, extreme corners.

A. (No answer.)

By the Court:

Q. Do you call this one building and this another building?

A. Yes, I do.

Mr. Grimes: May we have all three of those—two buildings marked because I intend to use that as the basis of a question. You will observe there is——

The Court: Yes. I will try to get it from the witness so it will be proper evidence.

By the Court:

Q. Do you say there are two buildings or three?

A. I say there is two.

[fol. 62] Q. What do you call that?

A. That, I think, is all one building, built at the same time.

Q. We will have to take it that way for the present. Would you say this is one building?

A. That is one building, yes.

The Court: I marked it 1.

Q. This whole thing is two?

A. Two.

The Court: I will mark it 2. Treat with it that way. It will be on the exhibit. Try and save words for your record.

By Mr. Rollins:

Q. What business was conducted, and is conducted by the defendant in the building on Exhibit 18, marked No. 1 by the Court?

A. Commercial banking, commercial business.

Q. No. 2, what business is conducted or was at the time of the institution of this action?

A. Savings bank department, personal loan department, commercial credit department, and they have a family lobby there showing different kitchen appliances.

Q. I show you Plaintiff's Exhibit 19.

A. One minute. I am not finished.

By the Court:

Q. Go ahead, finish.

A. Then in that same building——

Q. No. 2?

A. No. 2 building they take mortgage payments and deposits for the special checking accounts.

[fol. 63] By Mr. Rollins:

Q. Are the safe deposit vaults in that building, too?

A. Stairs leading to the safe deposit vaults.

Q. Building No. 2?

A. Building No. 2.

Q. I show you Exhibit 19 and ask you to state to the Court exactly what does that represent?

A. This is a picture of the interior of building No. 1 showing the commercial banking department.

Q. That is No. 1. That is used exclusively for commercial business?

A. Main floor, yes.

Q. I show you Exhibit 20 and ask you to tell the Court exactly what that represents.

A. This picture represents the entrance from the com-

commercial banking department into the savings bank department, walk in from the commercial department into the savings bank department.

Q. That is a connecting archway between buildings 1 and shown on Exhibit 18?

Mr. Grimes: I object to the form of the question, leading the witness.

The Court: Sustained. It is leading.

Q. With what does that connect?

A. It connects No. 1 and No. 2.

By the Court:

Q. When you are speaking of a door, archway, will you point out what you have in mind?

A. (Indicating).

The Court: I will put an arrow over what the witness just pointed to. That is it, is it not?

The Witness: Yes.

fol. 64] By Mr. Rollins:

Q. Who is the person in that photograph?

The Court: Does it make any difference?

Mr. Rollins: It is he.

The Court: They are not raising any question whether he was there or not.

The Witness: Right there.

Q. I show you Exhibit 21 and ask you what that photograph represents?

A. This is a picture of the savings department showing teller's windows and also showing glass sign with the word savings.

Q. How many of those tellers' windows bearing the sign savings, are there?

A. Six. There are six windows.

Q. That was the condition that prevailed in April, 1950 when you visited the premises?

A. Yes.

The Court: You do not have to ask that question. That is an over-all question.

Q. I show you Exhibit 22 and ask you to inform the Court what that represents.

A. This is a picture of the opposite side of the building No. 2, showing windows where the bank takes in those special checking accounts and mortgage payments. It also shows depositors' counter in the center which contains deposit tickets and withdrawal tickets for savings accounts and special checking accounts. It also shows part of the circular counter in the center where new accounts are opened.

[fol. 65] Q. I show you Exhibit 23 in evidence and ask you what that represents.

A. This is a picture of the counter itself in the center that they use to open new accounts and other bank business. They open savings accounts at this counter.

Q. Is there a sign saying new accounts?

A. There is a sign saying, new accounts.

Q. I show you Exhibit 24 in evidence. Will you tell the Court exactly what that represents?

A. This is a picture of the consumer credit department and also another picture of the counter where new accounts are opened, and this picture also shows the stairs going down to the safe deposit section.

Q. I show you Exhibit 25 in evidence and ask you what that represents.

A. This is another picture of the savings bank department showing the new accounts counter looking out toward Hempstead Turnpike, showing the door and the windows, door where depositors come in and out, and also shows the door connecting building No. 1 and No. 2.

Q. I show you Exhibit 26 in evidence and ask you what that represents.

A. This is another picture showing the consumer credit department and stairs to the safe deposit vaults, and part of the new accounts counter.

Q. What building?

A. In building No. 2.

Q. I show you Exhibit 27 and ask you what that represents?

A. This is a picture of the archway between building No. 1 and building No. 2. It also shows a picture of a door going out toward Hempstead Turnpike.

Q. What building?

A. Building No. 2.

[fol. 66] Q. Does that door, Exhibit 27, lead on to the street?

A. It does.

Q. Is this another view, Plaintiff's Exhibit 28, of building No. 2?

A. This is a picture taken upstairs, showing the main floor of building No. 2, showing depositors' counters and the door and it is part of the teller's windows where they take mortgage payments. It also shows connecting door between building No. 1 and building No. 2.

Q. I show you Plaintiff's Exhibit 29 and ask you what that represents.

A. This represents deposit ticket of the Franklin National Bank, showing the words, savings department, and the other side, represents special checking deposit ticket of Franklin National Bank. This was picked up on the counter of building No. 2 the date the photographs were taken, December 18, 1950.

Q. From where did you take these tickets or these withdrawal slips and make photographs thereof?

A. From one of the depositors' counters. Photographs were taken at the time we took a picture of the bank.

Q. Were these deposit counters open to the public?

A. They were.

Q. Did they use it to make deposits and withdrawals?

A. That is right, they did.

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Recess to 2 P. M.

ARTHUR R. SEATON, SR., recalled, testified further as follows:

Direct examination.

By Mr. Rollins (Continuing):

Q. I show you Exhibit 30 and ask you to please inform the Court?

A. This is a picture of the family lobby showing different exhibits.

Q. When you say, family lobby, you mean building No. 2, where savings accounts are maintained?

A. Yes.

Q. That was a savings department maintained by the bank?

A. (No answer.)

The Court: Building No. 2. Stop there.

Q. This is an exhibit of the same kind, commercial exhibit?

A. I believe so.

Q. Containing the objects, of course, there as shown?

A. Yes, that is right.

Q. I show you Exhibit 31 and ask you what that represents?

A. This is another portion of the family lobby in building No. 2, showing various exhibits.

Q. I show you Exhibit 32 and ask you what that reflects?

A. This is a photostat copy of the withdrawal slip of the Franklin National Bank showing the word, savings, pass-book also a blotter, photostat copy of a blotter on which they say save regularly for rainy days, and also states, we pay two percent on balances from \$100 to \$1,000, and one and a half percent on balances above \$1,000, no limit on deposits or withdrawals.

Q. Where was this found when it was photographed?

[fol. 68] A. On the deposit desk in building No. 2.

Q. Building No. 2 wherein the savings department of the defendant is or was maintained, you say they have these counters?

A. That is right.

Q. Those are used by depositors, normally used by depositors in any kind of savings bank?

A. That is right, yes.

Q. Do they have a compartment——

Mr. Grimes: I object to the form of the question and move the question and answer be stricken out as leading.

The Court: Yes.

Q. Describe to the Court exactly——

The Court: Has not he already done that? They are counters.

Mr. Rollins: I want to show counters where——

The Court: They are counters he has said before which depositors use to make out their deposit slips and carry on any other clerical work of their own they want to do. Probably pen, ink and forms.

Mr. Grimes: The testimony is the Franklin National Bank.

The Court: That is correct.

The Witness: That is right, yes.

Mr. Grimes: Motion to strike, leading question?

The Court: Yes, that is out. Is there any objection to the Court sort of——

Mr. Grimes: I have no objection to anything at all this Court does.

[fol. 69] The Court: We can leave that subject about that equipment. I think it is in the record now.

By Mr. Rollins:

Q. Did I understand you to say building 1 and 2 as shown in Exhibit 18 have separate entrances and exits leading on to the street?

A. That is right.

The Court: Yes, he said that.

Mr. Grimes: May I ask him what he means by separate entrances and exits?

The Court: Maybe you can agree on that and save cross examination. I think that is a good idea. Let the witness answer the question.

Mr. Grimes: In the absence of a question may—I am going

to object to it. I am going to move it be stricken in its present form.

Mr. Rollins: May I have the stenographer read the question back?

The Court: There is not any question. Mr. Grimes wants you to describe what you consider two exits and two entrances that open on the street.

The Witness: On building No. 1——

The Court: Is there an objection to the question?

Mr. Grimes: If this is a question intended to replace the previous question and answer, then I have no objection. If it is not then, I object to the previous question as leading and misleading.

[fol. 70] The Court: I sustain that objection. It was leading. The witness was there, so we can have the witness describe what he said were those two entrances. Go ahead.

The Witness: There is an entrance in building No. 1, and there is a separate entrance on building No. 2 where people can go in and out of the buildings without going through, crossing over to building 1 or 2.

By Mr. Rollins:

Q. Are these entrances and exits which you have mentioned, do they lead on to the street?

A. They do.

Q. To and from the street?

A. To and from the street.

The Court: Not only that, but the same street, he said.

Q. Same street, is that right?

A. That is right.

Mr. Grimes: There is an exit, I gather.

The Witness: Exit, yes.

The Court: I think you have that fully developed in your record.

By Mr. Rollins:

Q. Have you in the course of your duties during many years you have been associated with the State of New York, visited savings banks?

A. I have.

Q. Can you state with a reasonable degree of certainty [fol. 71] whether or not the savings department maintained by the defendant in building No. 2 as reflected in Exhibits 18-32 inclusive, has the appearance of a savings bank?

Mr. Grimes: Objection.

The Court: I would have to sustain that objection. That is merely the conclusion of the witness.

Mr. Rollins: As an opinion.

The Court: That would not be an opinion. That is a conclusion. First, you would have to establish the fact all savings banks had some sort of standard way of being laid out, and that this was contrary to that. We will strike out the last statement provoked by the Court. I fully understand it. I know what your objective is, and I was trying to give you my method of analyzing your question. I do not think the witness can state the conclusion whether in his opinion this particular bank's method of carrying on its business is different from or the same as any other bank he visited.

Mr. Rollins: Just physical appearance.

The Court: We could not do it without having a base to operate from. No witness can testify to something in his mind.

Mr. Rollins: Your Honor has a right to assume from a state of facts there is, in addition to the fact your Honor has a right to take notice how a bank does business, and how it appears. It is a matter of common knowledge.

The Court: I do not want you to rely too heavily on that. [fol. 72] You may see the significance of this building construction. I do not. I do not consider at this stage of the trial it is of great importance how one banker builds a building, but I am still keeping in mind the gravamen of your charge and that is, that savings accounts in this particular bank was emphasized. That is your point.

Mr. Rollins: That is right.

The Court: I am going to allow you to develop that but you will have to do it within the rules of evidence.

By Mr. Rollins:

Q. How many commercial banks have you visited in your career, different ones?

A. Perhaps about three or four thousand.

Q. That is continuously to the present date?

A. Yes.

Q. In your own experience have you ever seen in a commercial bank any tellers' windows with the legend, "Savings"?

A. Never.

Mr. Grimes: I object to the form of the question. I think there are several questions involved, if I understand it.

The Court: I think I will allow that question. The question is, in all of his examinations and inspections of three or four thousand banks did he ever see a teller's window with the word "savings" on it. I will allow him to answer that.

Mr. Grimes: I do not believe that was the question.

[fol. 73] The Court: Is that the question?

Mr. Rollins: Yes.

Mr. Grimes: I do not object to that.

The Court: We will substitute that for the one you thought you understood. That is what counsel is driving at. What is the answer?

The Witness: No.

Q. How many savings banks did you visit in your official capacity during your career and association with the Banking Department of the State of New York?

A. About the same amount, more or less, three or four thousand. That is repeated visits, you know.

By the Court:

Q. Different banks we mean in each instance? I was wondering about three or four thousand.

A. You visit a bank once a year.

Q. How many different banks? We are talking about the structure of the building now. How many different commercial banks? We will let you correct that if you want to.

A. Well, maybe a thousand different ones.

Q. So you change that three or four thousand to one thousand?

A. Three or four thousand would cover every institution.

Q. Just commercial, do you want to change that to one thousand? Mr. Rollins asked you about savings banks. How many different savings banks have you visited, inspected?

A. About a hundred, I would say.

[fol. 74] By Mr. Rollins:

Q. Did you ever see any of those savings banks have a teller's window without the words "savings" on it?

A. No.

Q. Is there anything about the physical make-up of a savings bank in contrast to a commercial bank?

A. Yes, there is, in the commercial.

The Court: You have to base that question on something. That is an expert question. You will have to give him a hypothesis of some kind. We do not want his—

By Mr. Rollins:

Q. Assuming that the physical conditions as reflected by Plaintiff's Exhibit 21—

The Court: He can assume conditions he saw at the defendant's bank.

Q. Assume the conditions that you saw at the defendant's bank in Franklin Square, Nassau County, State of New York, as reflected by Exhibits 18-32 inclusive, can you say with a reasonable degree of certainty whether it gives the appearance of the ordinary, common savings bank, modern savings bank?

Mr. Grimes: Objected to.

The Court: I must sustain the objection.

Mr. Rollins: May I ask why?

The Court: Yes. There is not enough in the question, and I do not think you have established there is any standard.
[fol. 75] Mr. Rollins: There cannot be any.

Q. Is there any particular standard that differentiates a savings from a commercial bank?

A. Yes, there is.

By the Court:

Q. Construction of the building, we are talking about.

A. No.

Mr. Rollins: Other than the signs "savings".

The Court: Any signs? We are not talking now about signs. We are talking about construction of the building, so his answer is no, there is not any distinguishing feature.

By Mr. Rollins:

Q. Does the fact that a bank has on its tellers' windows the words or legend "savings" distinguish that kind of a bank from a commercial bank?

Mr. Grimes: Objected to.

The Court: I would have to sustain the objection to that.

Q. Can you state with a reasonable degree of certainty from your experience as you state, in visiting a hundred savings banks approximately whether the defendant bank, because it had the legend "savings" or saving above its tellers' windows as reflected in exhibit 18, creates the impression that it is a savings bank?

[fol. 76] Mr. Grimes: Objection.

The Court: That is what the court will have to decide. I will have to sustain the objection. Do you mind if I make this suggestion? You have asked the witness to compare the structure. Could this witness not give his opinion with respect to some particular feature of the interior of all savings banks he has been to. Put it this way. Is there any distinguishing feature with respect to the interior of all the savings banks that you have visited, anything stands out?

The Witness: Yes, there is.

The Court: Do you want him to answer that?

Mr. Rollins: Yes.

The Witness: You will find the word "savings" in advertisements throughout the building.

Mr. Grimes: I move the answer be stricken out, not responsive to the Court's question.

The Court: I will have to sustain it. Advertising would not be interior.

The Witness: They have signs with the word "savings" and they describe what percentage of dividend they will pay.

By the Court:

Q. That is not a sign?

A. Yes, that is a sign, and they also—deposits, withdrawals are not permitted without passbook being presented at window in the savings bank.

[fol. 77] Mr. Grimes: I object to that and I ask it be stricken out.

By the Court:

Q. Is that a sign?

A. Yes, that is a sign.

Q. In each savings bank?

A. Yes, that is right.

The Court: I will have to let it stand, if it is a sign.

By Mr. Rollins:

Q. Can you now state whether the signs in this particular bank, defendant bank, Franklin Square, is reflected in exhibits 18-32 because the signs in comparison with the other banks that you visited gives the impression to the public it is a savings bank?

Mr. Grimes: Objected to.

The Court: I will have to sustain that. That is where the conclusion comes in.

Mr. Rollins: I asked in his opinion about it as it appears to him.

The Court: The witness could answer if the interior of the defendant bank was, upon his inspection, similar to or dissimilar to other savings banks he visited. He is qualified to answer that, but there is not any conclusion there. He is stating a fact.

By Mr. Rollins:

Q. Can you state whether or not the defendant bank, that is, the defendant savings department in building No. 2

compares as a savings bank in its physical appearance to other savings banks?

[fol. 78] Mr. Grimes: Objected to.

The Court: Yes. I would have to sustain the objection too. I think you can get a better word than compares, to begin with, and I see there is another objection.

Mr. Grimes: Savings department for one thing, unless it is specified what he means. I object on that ground, also.

The Court: Yes. Better divide that question, because there will be no objection to your concentrating on what you call building No. 2, whereas there probably would be no objection if you take the whole building for your first question. Then your second question, if they want to object to that, I will rule on it, but I think if you use the word, instead of compare, similar to, you may get over it better.

Mr. Rollins: Is it building 2 and the operation of its business there, is that objectionable?

The Court: You are going to get an objection. Go ahead, ask your question.

Mr. Rollins: Withdrawn.

Q. In your opinion, is the defendant's building No. 2 similar to those other hundred savings banks that you have visited?

Mr. Grimes: Objected to.

The Court: With respect to equipment or interior of the building?

Q. With respect to its equipment or interior of the building?

A. Yes.

[fol. 79] The Court: There is objection to that on the ground it is just dividing this up into building No. 2, which you contend is only part of the bank, is that right?

Mr. Grimes: I would like to hear the answer he gave to that. May I have the question and answer repeated? I move the question and answer be stricken.

The Court: I think I have to strike out the question and answer. You can adduce that proof, but counsel is technically right on that question.

Mr. Rollins: I withdraw it and leave it to your Honor,

because your Honor has the right to take notice as to the condition of other banks and if you wish, I will get the citation for your Honor.

The Court: I will ask him this question. With respect to the hundreds approximately, savings banks which you have inspected and visited, treating exclusively with the interior will you say that the defendant bank is similar to those savings banks? Do not answer for a moment.

Mr. Grimes: No objection.

The Witness: Yes.

The Court: You have that question for the whole building. He says yes, there is some similitude.

Mr. Grimes: I understood he said they were similar.

The Court: Yes, they are similar. That is right. No qualification.

Q. With respect to the method of doing business with this defendant bank, and with regard to their savings department [fol. 80], can you express an opinion whether they are the same as those other hundred savings banks?

Mr. Grimes: Objection.

The Court: I will have to sustain the objection with respect to doing business. We have not had any evidence at all of doing business yet.

Mr. Rollins: I will leave the situation as it is right now. I feel there is enough to decide the question. May I call your Honor's attention at this time inasmuch as the bill of particulars mentions there are six separate tellers' windows with the word "savings" on it, exhibit 21, distinctly shows on this photograph. I know your Honor noticed that.

The Court: Oh, yes, I saw this one. Yes, I noticed it.

By Mr. Rollins:

Q. This action was instituted by direction of the Superintendent of Banks after you made a report to him?

A. That is correct.

Q. Direction was given to the Attorney General?

A. That is correct.

Mr. Rollins: You may inquire.

Cross-examination.

By Mr. Grimes:

Q. You have been in the Department of Banking for some twenty-five years, have you?

A. Yes.

Q. At one time I believe you said you occupied the position of Special Deputy Superintendent of Banks, is that correct?

A. That is correct.

Q. Prior to going into the Banking Department did you make any special study of banking?

A. I did.

Q. Passed a Civil Service examination?

A. Yes.

Q. For the past twenty-five years, if that is the period of time, you have had no other occupation?

A. That is correct.

Q. You devoted your entire time to banking?

A. That is correct.

Q. Is your jurisdiction state-wide?

A. Yes.

Q. You have visited banks all over New York State, is that correct?

A. Yes, and Long Island.

Q. Beg pardon?

A. Long Island, too.

Q. Including Long Island?

A. Yes.

Q. Has it been your practice in line with your duties to follow the procedures of others doing business?

A. Yes, he said in general, I think.

Q. In general?

A. Yes.

Q. In New York, of course, we have State commercial banks, do we not?

A. We do, yes.

Q. About how many of those are there? I am not asking an exact figure but a rough approximation.

A. I would say between three hundred and five hundred throughout the State.

Q. Three hundred to five hundred; and we have savings banks chartered by the State, is that correct?

A. We have, yes.

Q. And we have savings and loan associations chartered by the State?

A. Yes.

Q. About how many savings banks do we have in New York State?

[fol. 82] Mr. Rollins: I should like to say for the record, it is not proper cross examination.

The Court: Allowed.

The Witness: I would say approximately twelve hundred. I am not sure. These are all approximate figures I am giving you.

Q. How many State chartered savings and loan associations, approximately?

A. About a hundred.

Q. In New York State there are National banks, are there not?

A. Yes.

Q. Do they come under your jurisdiction in any way?

A. Except if they have a safe deposit corporation within the bank we examine the safe deposit corporation.

Q. Do you make those examinations?

A. Yes.

Q. So you are generally familiar with National banks in the State of New York?

A. As far as safe deposit boxes are concerned, yes.

Q. Which of the banks enumerated have the power to accept deposits from such depositors or people, to earn interest?

A. Commercial banks, savings banks and savings and loan associations.

Q. Would you say, sir, that these banks are in competition with each other for deposits of money, people who have money, on which they wish to make deposits and obtain interest?

A. I would say yes. You mean commercial banks and savings banks.

Q. All types of banks.

A. Yes.

Q. Do not they all compete with each other for people's money?

A. That is right.

Q. That is how they get money to loan and make money?

A. That is correct.

[fol. 83] Q. You say you would say, so you do not have any doubt about it?

A. No, I do not.

Q. Competition between these various types of banks is very keen?

A. It is.

Q. They go out rather aggressively for deposits?

A. That is correct.

Q. In support of that they all advertise?

A. Yes, they do.

Q. They advertise quite extensively?

A. Yes.

Q. No doubt about that?

A. No doubt about that at all.

Q. In the course of your duties do you follow the various types of ads. used by these various types of banks that do business in the State of New York?

A. No.

Q. You do not?

A. No.

Q. Do you see them in the daily newspapers?

A. Yes, if I am reading the daily paper I will look at them, if they are there.

Q. You do read the daily papers?

A. Yes, I think so.

Q. You think you read the daily paper?

A. I think so, yes. I read the daily paper.

Q. No doubt about it?

A. No doubt about it.

Q. You see advertisements in the daily paper?

A. That is right.

Q. You see ads. of savings banks?

A. Yes.

Q. National Banks?

A. Yes.

Q. You see that type of advertising daily in which they advertise for deposits, is that not correct?

A. Yes, that is correct.

Q. Some banks advertise under different names for accounts on which they pay interest?

A. That is correct.

Q. Some National banks do, do they not?

[fol. 84] Mr. Rollins: That is objected to, what other banks do. We are not trying all banks. We are only trying this bank.

The Court: I will allow it.

The Witness: Yes.

Q. In fact, most National banks do, do they not?

A. I suppose so. I cannot answer that unqualifiedly because I don't know what other banks do throughout the State.

Q. You have seen a number of ads. by National banks?

A. Yes. Whether all National banks do it or not, I don't know.

Q. In those ads. which you have seen in daily papers when the National banks advertise for deposits of people and offer to pay interest, what are the terms they use?

A. Special interest deposits or thrift account.

Q. Compound interest account?

A. Once in awhile. It is an old fashioned type.

Q. Thrift account, special interest account and compound interest account, is that correct?

A. That is correct.

Q. In your observation compound interest account is a phrase used less than others?

A. That is correct.

Q. Which phrase is most often used in your observation?

A. Special interest account.

Q. Thrift account?

A. Comes next.

Q. Comes next most used?

A. That is correct.

Q. When a savings bank advertises what words do they use?

A. Savings account and—

Q. And savings and loan associations?

A. Savings accounts.

Q. Leaving out savings and loan associations advertising, [fol. 85] and considering savings banks advertising, they pay interest at a certain rate on deposits?

A. That is correct. They call it dividends.

Q. National banks of the type you have mentioned offer the same service, do they not?

A. Yes.

Q. In other words, they ask people to deposit money there and they offer to pay interest, is that correct?

A. That is correct.

Q. State commercial banks do the same thing?

A. Yes.

Q. Is it your view that these various phrases used, such as savings or compound interest, thrift, special interest all mean the same thing?

A. They do, yes.

Q. Is it your view they all have equal value for advertising purposes?

Mr. Rollins: That is objected to. Highly speculative.

The Court: This is cross examination. He has a right to ask.

Mr. Rollins: May I submit to the Court there is only one. Did they violate the law? What he thinks is immaterial. The law is definite.

The Court: I think you will have to be corrected in that attitude. This is not rigidly defined violation. You charge here similitude, the holding out of this bank as a savings bank when in fact it is not. That opens the door to a very wide field of proof on the part of the defense, so it is not really restricted to whether or not they have a right to use [fol. 86] the word "savings". That may be a question of law, but this other, which is surely in your case, is a question of fact. He is qualified here as an expert, and I assume he is an expert, and you have charged advertising by the bank. I think counsel has a right to show what other banks do, whether it is effective and all the surrounding circumstances. That is one of the elements, is it not?

Mr. Rollins: It has the physical aspect of conducting itself as a savings bank.

The Court: You have put in evidence all exhibits showing two percent, payable and word "savings", so on. I am only devoting a little time to this to indicate to you the field is broader than you think, and that is the reason for my ruling. Go ahead.

The Witness: It is.

Q. In other words, each of these four words, savings account, thrift account, special interest account and compound interest account is in your opinion the equivalent of any other?

A. Yes.

Q. You are sure of it?

A. Yes.

Q. No doubt about that in your mind?

A. No.

Q. In other words, thrift account is the equivalent of savings account?

A. That is correct.

Q. Compound interest account is the equivalent of savings account?

A. That is right.

Q. Special interest account is the equivalent of savings account, is that correct?

A. That is right, that is correct. Yes.

Q. You were directed to make this investigation, am I correct?

A. Yes, that is correct.

[fol. 87] Q. By the State Superintendent of Banks?

A. That is right.

Q. Your investigation was under some section of the Banking Law of the State of New York?

A. That is right.

Q. What section was that?

A. 258, sub-division 1.

Q. What section was that?

A. 258, sub-division 1.

Q. What does the first part of that sub-division prohibit?

The Court: Is not that a question of law?

Mr. Grimes: It is a mixed question of law and fact.

The Court: If you want to press it, but it opens the door to the plaintiff to have this witness explain the statute.

Mr. Grimes: I am fully aware of that.

Q. That prohibits a National bank, among others, does it not, from using the word, savings or saving, or their equivalent?

A. That is correct.

Q. That is right in the statute, as a matter of fact, and you have read the statute?

A. That is right.

Q. That has always been your understanding?

A. Yes.

Q. You have just testified that these other three phrases thrift, compound interest and special interest account, are the equivalent of savings account?

A. Yes.

Q. Have you learned in the past year thrift account being advertised for by banks?

[fol. 88] A. Not off-hand, no. I cannot mention any names of banks now. I have seen them.

Q. I am going to ask the question with respect to compound interest accounts.

A. The same thing applies.

By the Court: .

Q. You cannot give names?

A. No.

Q. But you would say banks have done it in the past year?

A. Yes.

Q. The same question as to special interest accounts?

A. (No answer).

By Mr. Grimes:

Q. The question was, can you name any bank which has advertised in the past year, using the words, thrift account?

A. I said no, I could not name.

By the Court:

Q. You said you knew banks did it? Your answer would be the same with respect to compound interest and special accounts, too?

A. Yes.

By Mr. Grimes:

Q. You know a number of banks have used those terms in the past year in the State of New York, is that correct?

A. Yes, that is correct.

Q. Are you familiar with the prosecution of a law suit brought by the State Banking Department, or by the Attorney General, in behalf of the State Banking Department, for a violation of Section 258, sub-division 1?

Mr. Rollins: Objected to, if the Court please.

The Court: I think I will allow it. I will take that evidence, there have been a number of prosecutions because I assume the question is going to be answered, and will be in the negative to show the attitude of the State with respect to the statute over whatever period of years it has been on the statute books.

Mr. Rollins: May I say there is no estoppel against the State of New York. Whether the State enforces or does not enforce it does not excuse another in committing an offense.

Mr. Rollins: Does your Honor rule Section 258 is subject to interpretation, and there is ambiguity?

The Court: I will not add the latter part, but I will say certainly it is the subject of interpretation. That is why you are here. Your department has interpreted it that the defendant has violated it.

Mr. Rollins: May I say for the purpose of the record Section 258 in my opinion is unambiguous, and has been ruled on, and construed by the Court of Appeals, the Court of Last Resort. There is no ambiguity in this case, no matter what any other department says or does on the subject, to me is of no legal consequence, certainly no aid in the interpretation of the statute, because it does not need any.

[fol. 90] The Court: I will record your objection, but I will allow the answer. Just answer the question.

The Witness: Will you repeat the question, please? I am not familiar, no.

Q. You hear about prosecutions, whether in civil or criminal forums, do you not, in the performance of your duties as a skilled bank examiner?

Mr. Rollins: I object.

The Court: I will allow this.

The Witness: No. We never talk about it ourselves, and the only time we ever look and see, check on other law suits, if we have a case such as this case here and the attorney does all that, checks back. I have never done it, noted how to do it.

Q. How many State bank examiners are there?

A. One hundred and ten.

Q. You do not talk among yourselves at all?

A. Not about law suits. We talk general banking business.

Q. Let me ask you this. Can you name any single prosecution, civil, or criminal, of any bank in the State of New York for using the words thrift account in the past twenty years?

A. No, I cannot answer that because I don't know.

Q. You cannot name any?

A. No, because I don't know.

Q. I ask you the same question with respect to the use of the words, special interest account, can you name a single prosecution civil or criminal of any bank for the use of that phrase?

[fol. 91] Mr. Rollins: May I submit the use of those phrases is not prohibited by statute of New York.

The Court: According to the development of the cross examination the witness has testified those three expressions are the equivalent of saving and savings.

Mr. Rollins: By National banks.

The Court: And counsel is developing that point.

Mr. Rollins: He is trying to find out if banks use that term there is no violation of the law, if one does use it.

Mr. Grimes: I do suggest I have a right to examine this witness, especially in view of the fact he is qualified on these very subjects.

The Court: I have overruled the objection, but I want counsel's reasons noted.

Q. I ask you the same question with respect to compound interest.

A. I don't know, no sir.

Q. That is not responsive to my question. My question is, can you name a single prosecution, civil or criminal, brought by the Banking Department, or in behalf of the State of New York, against any bank in the State of New York in the past twenty years for the use of the words thrift account, special interest account or compound interest account? Can you name one?

A. No, I cannot, no.

Q. You cannot, can you?

A. No, I said.

Q. Do you know of any prosecution that is in progress at the present time or in the course of preparation for the use of any of those three words?

[fol. 92] A. With the exception of this case here, I do not.

Q. The only one you know of?

A. That is right.

Q. You have been to the defendant bank on a number of occasions?

A. That is correct.

Q. You testified on direct examination you were there on April 6, 7, 10 and 11 of 1950 and September 18 of that year, is that correct?

A. That is correct, yes.

Q. As you approached the bank you approached it from the Hempstead Avenue side, is that correct?

A. That is correct, yes.

What is the first thing you observed when you approached the bank? Let me ask you this, as you approached the bank did you see any sign stating what any of the buildings, purporting to state what the bank was, and in asking that question I ask you to look over Plaintiff's Exhibit 18.

A. It has a sign, Franklin National Bank, on it.

Q. It has a sign, Franklin National Bank, on it?

A. That is right.

Q. Did that convey any meaning to you?

A. Yes.

Q. What meaning?

A. National Bank, under the jurisdiction of the Federal Government.

Q. Did that suggest to you in any way it was a savings bank chartered by the State of New York?

A. No, it did not.

Q. The two are inconsistent with each other? That is to say, one is a Federally chartered corporation, and the other is a State chartered corporation?

A. That is correct, yes.

Q. As you approached the building were you deceived in any way by the appearance?

A. No.

[fol. 93] Q. Perfectly clear to you?

A. That it was a National bank.

Q. That it was a National bank?

A. Yes.

Q. Did that look to you like one building, two buildings, or three?

A. Looked like two buildings.

Q. Look a little further and see if you can see what might be a third building.

The Court: You do not want him to look at the picture and tell us? You want him to tell what he saw when he was there.

Mr. Grimes: Look at the picture to see if it refreshes his recollection as to what he did see.

The Witness: I see two buildings here, I see an extension to the main buildings, an extension, I will put it that way, but to my mind it is two buildings and one building, the first building with the Franklin Bank sign on is the original building and the other building was built sometime after.

Q. Does building No. 2 look to you something like a department store from the outside?

A. No, I would not say that.

Q. Do you see any evidence there might be space for displays of any sort in that building?

A. No.

Q. You note the facade, face of the building is partly of glass, that is correct?

A. That is correct.

Q. It has revolving doors?

A. That is correct.

Q. On the occasion on which you visited that building you made a thorough investigation, did you?

A. Of the main floor building 1 and 2.

[fol. 94] Q. Did you yourself gain the impression that the Franklin National Bank is in fact a savings bank? You, yourself?

A. No.

Q. Did not fool you in any way?

A. No, did not fool me in any way.

Q. You knew it was a National Bank?

A. That is right.

Q. You filed an affidavit in this case, did you not, in connection with an application to the Supreme Court, New York County, for an injunction pendente lite against the defendant?

A. Yes.

Q. Can you name a single person in the entire State of New York or in the entire world who has been deceived into thinking the Franklin National Bank is in fact a savings bank, quoting the name?

A. I cannot name anybody, no.

Q. Can you give one name?

A. No.

Q. Not one? About how many people are there in the State of New York?

A. I don't know.

Q. Whatever the number is—you know there are millions?

A. Yes.

Q. You cannot give the name of one person who has ever been deceived into thinking the Franklin National Bank was a savings bank, can you?

A. No.

Q. You filed a report?

A. That is correct.

Q. You filed an affidavit?

A. Yes.

Q. On the basis of that you realize the Attorney General filed a bill of particulars in this case?

A. That is right.

Q. Charging the Franklin National Bank with having committed fraud, don't you?

A. Yes.

Q. Was there any other report filed by anybody with the State Banking Department in this matter?

A. No.

[fol. 95] Q. And yours is the only one?

A. Mine is the only report.

Q. Was the bill of particulars wrong on the basis of your report, then?

A. It was, yes.

Q. The only thing you had to go by?

A. The only thing I had to go by.

Q. You realize the bill of particulars also charged a deliberate deception on the part of the Franklin National Bank?

Mr. Rollins: While I make no apology for what is in the bill of particulars, I feel I took the course as stated by law. I contend, as a matter of law, it does constitute fraud. The witness had nothing to do with the preparation of the pleadings in the case as you know, and this statement, I don't know what it could serve, except to throw a smoke screen in this case as I feel it does.

The Court: I would not get so excited about it. Counsel would be derelict in his duty if he did not search for his motives. Counsel is seeking for motives.

Mr. Rollins: This is not an issue in this case.

The Court: I know you say that in your brief, yet counsel would have a right to show interest and motive of the witness on the stand giving factual testimony, and that is all he is doing. Answer the question.

The Witness: Repeat the question.

[fol. 96] By the Court:

Q. The question was, did you know the bill of particulars states in it that there was deliberate fraud practiced by the defendant bank in holding itself out as a savings bank when it is a National bank?

A. That is right.

Q. You knew that?

A. I knew that, yes.

By Mr. Grimes:

Q. You give the same answer to the same question with reference to the charge in the bill of particulars that there was deliberate deception of the public by the defendant bank?

Mr. Rollins: I object. The bill of particulars was verified by me, assistant Attorney General of the State.

The Court: I will allow his question.

The Witness: I give the same answer, yes.

Q. It also charges that the Franklin Bank usurped the rights of other people, savings banks and loan associations; you realize that?

A. I do.

Q. Further, we have committed a public nuisance; you know that charge is in the bill of particulars?

A. Yes.

Q. That is all based on your report, is that not right?

A. That is right.

Q. Yet you cannot name a single person who was deceived?

A. That is correct.

Q. Therefore, I take it you have not produced any other witnesses in court who will testify, or could possibly testify [fol. 97] they have been deceived in any way by the bank?

A. I did not try to find anyone, I don't know, I could not answer that question, personally, as an individual, don't know anybody.

Q. Let me say, you were not deceived and you do not know anyone else who was deceived, is that correct?

A. That is right.

Q. You say you visited upwards of a hundred savings banks in the course of your career of twenty-five years?

A. That is right.

Q. How many savings banks have you seen that had airplanes in the lobby?

A. I have not seen any with airplanes in the lobby.

Q. Automobiles in the lobby?

A. Have not seen any. Dime Savings Bank of Brooklyn.

Q. A kitchen used for a display?

A. They have a display.

Q. When did you see that?

A. Of complete kitchen equipment, oil burners and everything to encourage.

Q. When did you see that?

A. December this year, 1950.

Q. Did you ever see one before December, this year in the Dime Savings Bank?

A. Oh, yes, yes.

Q. When did they start doing display type of work?

A. That I don't know.

Q. You don't know whether it was before or after the Franklin National Bank began to do it?

A. I imagine it was before the Franklin ever did it because the Dime Savings is older than the Franklin National Bank.

Q. You don't know?

A. No, don't know.

Q. You don't know it at all, do you?

A. No.

Q. Did you report to the State Banking Department that there was only one function performed in building No. 2?

A. No, I did not.

[fol. 98] Mr. Grimes: May I have that report.

The Court: The Clerk has it. It is in evidence.

Q. Have you recently read the affidavit you filed in this case on the application for an injunction pendente lite?

A. No, I have not read it since I signed it.

Mr. Grimes: Is that among the Court's papers? I would like to show it to the witness.

The Court: That is in the application. I do not know whether it is here.

Q. You recognize on this document which reads, sworn to before me this 12th day of May, 1950, your own signature, do you not?

A. That is correct, that is my signature.

Q. Will you please look over the document of which that is part and see if you recall that document?

A. Yes, I recall it.

Mr. Grimes: May the record show I am referring to, and the witness is referring to an affidavit signed by Mr. Seaton

filed May 12, 1950, filed in this proceeding in connection with an application for an injunction pendente lite.

The Court: That is consented to, is it not, that this affidavit is part of your application for a temporary injunction? Yes, that is consented to.

Q. You recall signing that, don't you?

A. I do, yes.

[fol. 99] Q. Will you please just look it over, briefly. Will you please look down at the bottom of the second page starting with the words, by which, do you find that?

A. I do, yes. I wish—page 2?

Q. Did you there make the statement that—you see where you have referred to the phrase, connecting building?

A. Yes.

Q. You see the phrase used exclusively for savings accounts?

A. That is right. I do.

Q. That statement was not entirely accurate, was it? That there is a building used exclusively for savings accounts?

A. Well, I did not say, we explained in this affidavit here that the back—I cannot answer that question your way you put it, answer that question the way you put it.

By the Court:

Q. You cannot answer yes or no, is that what you want to say?

A. I cannot answer the way you put that question.

By Mr. Grimes:

Q. You see the words, contiguous building, do you not?

A. That is right.

Q. I show you Plaintiff's Exhibit 18 and ask you what if any part of that photograph is represented by what you refer to as a contiguous connecting building.

A. Building No. 1 is one building, and the building next to it is the building next to it, building No. 2.

Q. In your affidavit which of those two did you mean by contiguous connecting building?

A. Middle building, put it that way.

[fol. 100] Q. Which one is that number?

A. No. 2.

Q. Building No. 2, do you say the reference there in your affidavit in that statement that building is used exclusively for savings?

A. I say that part in here, yes.

Q. You said that building was used **exclusively** for savings, did you not?

A. No. In another part of the affidavit I say in the back of the savings department.

Q. I am talking about that part of the affidavit.

A. All right. Let me explain the whole business. I am not going to answer the question the way you are putting it, because it is incorrect.

The Court: Do not say what you are not going to do. I am not in any way admonishing you, but your question was, did you say in that affidavit, and if you press that question I think the witness has the right to use any part of the affidavit.

Mr. Grimes: I think that is quite correct.

Q. In that portion of the affidavit to which I have referred, where you have, as you have said, used the phrase contiguous connecting building, did you not then and there say that building is used exclusively for savings?

A. No, I did not.

Q. Please look at the affidavit and see if you do not.

A. It says, it reads that way here, but that is not the intention, the whole building was not used for savings; a certain portion was.

Q. Did you ever go up the second floor of that building? Building No. 2?

A. No.

Q. Did you ever go to the mezzanine floor?

A. Yes.

[fol. 101] Q. Is that portion used for savings?

A. No. That was the directors' room, I believe or directors' table in there.

Q. Has a reference library there?

A. I don't know.

Q. You were there?

A. I was there, but I don't know whether there is a reference library there.

Q. Have you ever been up on the third floor?

A. No.

Q. In your investigation did you ever go to the third floor?

A. No.

Q. You do not know what is up there?

A. No.

Q. Whether it is a mortgage department or otherwise?

A. That is right, don't know what is up there at all.

Q. You were present at the examination of Mr. Roth before trial?

A. Yes, that is right.

Q. That took place on the mezzanine floor?

A. That is right.

Q. You heard him testify to some twenty-one banking functions that took place on the ground floor of the family lobby, did you not?

A. That is correct, yes.

Q. You had occasion to check up on those right then and there, did you not?

A. No.

Q. To see whether there were those functions there?

A. No. I did not check on it.

Q. You had an opportunity?

A. I had an opportunity, yes, but it was not necessary.

Q. You had no reason then to question his statement, there were some twenty-one services performed right on the ground floor?

A. That is right.

Q. The fact of the matter is this savings counter occupies [fol. 102] a very, very small part of the family lobby, is that not true?

A. No, no, I would not say that.

Q. Have you any idea, percentage wise, what it does occupy of the entire family lobby, what percentage of the entire floor space is occupied by the savings counter?

A. I would say half.

Q. Half of the front of the building?

A. (No answer.)

Q. I am talking about the entire ground floor.

A. Ground floor?

Q. That question is clear. You know what I am referring to, the entire ground floor.

The Court: When you say building, do you mean 1 and 2?

Q. I am talking exclusively about what is designated on Exhibit 18 as No. 2, the entire ground floor, what percentage would you say is occupied by the savings counter?

A. I would say the savings counter—you mean where the tellers' windows are?

Q. Precisely.

A. (No answer.)

By the Court:

Q. What portion, percentage wise, counsel wants to know if the space is devoted to savings?

A. I would say half.

By Mr. Grimes:

Q. Half of the entire ground floor area, is that correct?

A. That is correct.

Q. Is it not a fact it is off in a little alcove on the right [fol. 103] hand side as you go in there, the counters are?

A. That is correct.

Q. The other half of that alcove contained, when you were there, a display of storm sashes and other woodwork?

A. In back, that is correct.

Q. Is it not a fact in your affidavit you made reference to a circular counter of some sort?

A. That is right.

Q. Was the counter circular?

A. It has a rounded effect, no, it was not completely round, it had a circular effect.

Q. You reported the fact it had a sign said, new accounts on it?

A. That is right.

Q. Which led inescapably to the conclusion there was a savings bank there, did you not?

A. That is right, I did.

Q. Did you make any inquiry as to what types of new accounts that referred to?

A. No, but I did witness a depositor opening a savings account at that counter.

Q. You saw a depositor open a savings account at that counter?

A. Did.

Q. Did you make inquiry as to whether other types of new accounts could be opened at that counter?

A. No, because I knew there were.

Q. You knew there were what?

A. Other types of accounts being handled there, accounts opened up, special checking account was one I think, application taken for consumer credit loans were taken there, too.

Q. In your affidavit did you make this statement, "the fact there is a large circular counter in the middle of the floor with a sign which reads, new accounts, tends to [fol. 104] support the inescapable conclusion it is a savings bank and operated as *as such*?"

A. That is correct. That is what I said, and that is what I say, and that is what I mean.

Q. Did you intend to convey the impression these signs new accounts, referred only to savings accounts?

A. I meant the sign, new accounts, and the counter itself.

Q. Would you wish to change the statement you made in that affidavit in any way?

A. No.

Q. If you should discover that counter was also used for other types of new accounts?

A. This affidavit is in connection, used with the word, savings and operated as a savings institution, what other business going on at that counter. I know as a bank man all the different services a bank has, every other bank has, that was understood in my mind, and my investigation was for the purpose of finding out whether the bank was using the words, savings, in violation of the Banking Law, which I did.

Q. At that counter you are not prepared to challenge the fact that for a number of years they have used that counter for the purpose of opening different types of accounts and savings accounts, you are not prepared to tell us that?

A. No.

Q. So, as I see it, there was a sign on the counter, which said, new accounts, even though other types of accounts than savings accounts might be opened there, as far as you knew, plus the fact that off to the right there were some counters which had signs saying savings, over them, led you to the conclusion that this bank was operating as a savings bank?

A. That is right. The lobby in front of the savings [fol. 105] bank had depositors' counters; every one of these depositors' counters had deposit and withdrawal slips with the word, savings, on it, so proportionately the whole front of the teller window in that bank was part of the savings department.

Mr. Grimes: I move the Court to make a personal inspection to determine the question that has been raised in this case.

The Court: There is, I understand, no objection to that?

Mr. Rollins: No objection.

The Court: Let it appear of record if the Court finds it advisable it will make the inspection.

Q. Can you name the various types of service that are granted by the bank in the family lobby, various types of service they have there?

A. No, I am not familiar with the various types of service they have there, but I will concede what Mr. Roth said is correct, because I know every bank has that service whether in building No. 1 or building No. 2.

Q. You observed the installment loan department, did you not?

A. I did.

Q. That is a very sizable department?

A. That is right.

Q. Savings banks make loans, installment loans?

A. Yes.

Q. They make installment loans?

A. They make rehabilitation loans, modernizing loans, not the type of loans the Franklin National Bank makes. [fol. 106] Q. The installment loan department of the Franklin National Bank occupies a large part of the ground floor of building No. 2?

A. They occupy the back of the building No. 2 back

part, the front part is occupied by the savings department division.

Q. My question is, it occupies a large part of the floor area of building No. 2, does it not?

A. I would not say a large part, no, it occupies a portion of it, not all of it.

Q. A small part?

A. Yes.

Q. Any savings bank you have ever seen make loans on automobiles?

A. No.

Q. Refrigerators?

A. No.

Q. As you went into the Franklin National Bank in the lobby, you saw types of merchandise on display, did you not?

A. No. As I walked in the bank I did not see that.

Q. After you got in the lobby you looked around?

A. Yes. I walked toward the back and I saw it away from savings department.

Q. In the lobby there came a time you looked over and you saw something to the right which was a savings counter?

A. That is correct.

Q. What right south of the savings counter was there, right to the left of the savings counter? Did you see any merchandise there?

A. Yes, I did, later on after I inspected the front part of the main floor.

Q. Right alongside the savings counter did you not see a display of woodwork, advertising sash and doors facing the savings counter just to the left of it, did you not see—

A. I don't remember at the time of my original investigation. This is in September you are showing us now. [fol. 107] Q. Do you recall any exhibit at that particular time?

A. I saw an exhibit there, yes, over by the elevator, around that section.

Q. Just within a few feet of the left hand as you turn to the right, looking toward the savings counter, there was an exhibition, was there not?

A. Let me see the picture, please.

Q. Take a look at exhibit 30.

A. There is an exhibit there, yes. Here is a picture of it.

Q. That was next to the savings counter?

A. I don't know. I cannot see what is on this side.

Q. You saw a display of Youngstown kitchens shown in exhibit 31, is that correct?

A. That is correct. I saw that.

Q. Did you ever see business like that in a bank before?

A. Yes, in the Dime Savings Bank, Brooklyn.

Q. That is the only one, is that correct?

A. That is correct.

Q. You are unable to say with respect to the Dime Savings Bank whether they started an exhibition of merchandise before or after the Franklin National Bank?

A. No, I cannot say that.

Q. For all you know they copied the Franklin National Bank?

A. Could be the other way, too.

Q. Could be that way also, could it not?

A. Could be.

Q. What internal feature or features of a savings bank other than the word, savings, differentiates a savings bank from other banks?

A. I don't quite get that question.

Q. Well, now you testified about the internal appearance of a savings bank. As I understand your testimony, you say there are two things, one, new accounts, plus the sign, [fol. 108] savings, which you consider make up the appearance of a savings bank?

A. Plus deposit tickets and withdrawal tickets on the counters.

Q. Do not commercial banks have signs saying, new accounts?

A. Some of them have, some have not.

Q. Except for the sign, savings, what differentiates the internal appearance of a savings bank from any other bank?

A. Except for the sign, savings, that is all, no other difference.

Q. They appear to be the same? They all have counters?

A. No. Wait a minute now. In a savings bank they

usually have murals painted around the walls in savings.

Q. Commercial banks have too, do they not?

A. Some of them do.

Q. Do the banks you have visited, all banks, endeavor to sell Government bonds?

A. Yes.

Q. United States Savings bonds?

A. That is correct.

Q. They advertise that fact in banks?

A. That is right.

Q. And use the word, savings in doing so?

A. United States Savings bonds.

Q. They are requested by the Federal Government, Treasury Department, to do that, to sell them?

A. That is right.

Q. And they all do?

A. They do.

Q. Whether they are a savings bank, a savings and loan association or a commercial bank?

A. That is right.

Q. On redemption they are paid for the service in redeeming those bonds?

A. That is correct.

Q. They provide a service in the banking business in selling bonds to their depositors, is that right?

A. Yes.

[fol. 109] Q. That is a use of the word, savings, in the banking business, is it not?

A. I said, yes.

Q. Did the Banking Department ever take exception to that?

A. Not to my knowledge.

Q. Is not that a violation of law as you understand it?

Mr. Rollins: That is objected to.

The Court: I sustain the objection.

Q. Is there anything other than the word, savings, you observed in the Franklin National Bank that resembles a savings bank?

A. Yes, in the Franklin Square bank you have a sign,

Franklin National Bank, you had a sign stating they were to pay dividends on deposits.

Q. Dividends?

A. Dividends.

Q. The Franklin Bank?

A. I think it was dividends or interest, pay interest.

Q. Don't you see that in other banks? Would you see that in commercial banks, interest?

A. Pay interest, yes.

Q. A sign about paying interest?

A. Yes, but they do not use savings account.

Q. What, in connection with the Franklin National Bank, other than the use of the word, savings, give it the appearance of a savings bank?

A. On account of the fact they have counters saying, Christmas Club, over the top of each teller's window.

Q. Then it is only the use of the word, savings?

A. Nothing else.

By Mr. Rollins:

Q. When you went to the defendant's bank, you were [fol. 110] acquainted were you not, because of information furnished you that it was a National bank?

A. That is correct.

Q. So that you knew it was not a State savings bank or a State savings and loan association before that?

A. That is right.

Q. So, when you went to the bank and made the inspection that you did make, you were not fooled because of that reason in believing it to be a savings bank?

A. That is right, I was not fooled.

Mr. Grimes: I object.

The Court: Allowed.

Q. When you want to make your investigation in April, 1950 as to the activities of the defendant bank with respect to their savings department, was it your purpose in discovering facts as they affect the public?

A. That is true, yes.

Q. When you said you were not fooled that it was a

savings bank and creating the impression it could give the same effect to the public?

A. Oh, no.

Mr. Grimes: I object to it.

The Court: I have to sustain the objection to the form of the question anyway.

Q. The fact you knew it gave the appearance and acted as a savings bank in your opinion would that have the same effect on people who were not schooled like yourself?

A. No.

Mr. Grimes: Objection. Purely argumentative.

[fol. 111] The Court: Sustained. Strike out the answer.

Q. Speaking to you specifically with reference to the affidavit referred to by Mr. Grimes in his cross examination, affidavit sworn to May 12, 1950 in support of the application for a temporary injunction, wherein you state that—

Mr. Grimes: I am going to object to reading the affidavit, any portion of it not read.

The Court: I will have to hear the question.

Q. Wherein you state the same language he stated, building used exclusively for savings accounts, and is constructed—

Mr. Grimes: I object to that question.

Q. Referring specifically to your affidavit, May 12, 1950, submitted to Special Term, Part I, New York County in support of the application for a temporary injunction in this action, did you intend to convey by your statement in that affidavit referring to connecting building, used exclusively for savings accounts by depositors constructed—

The Court: I understand he is consulting the affidavit to be reminded of the language in it. He cannot read from something not in evidence. He may consult the affidavit to get his language.

Mr. Grimes: He was reading. I think he was. That was the basis of my objection.

[fol. 112] Q. (Continuing:) —when in substance you stated in your affidavit, May 12, 1950, referred to by Mr. Grimes on cross examination, wherein you stated—

Mr. Grimes: That is what I object to.

The Court: If he paraphrases it in his own language.

Q. That the defendant bank gave the impression that it was by physical structure and appearance, that it was a savings bank, was it your conclusion it gave that effect to you or to the public?

Mr. Grimes: I object. Leading.

The Court: I would have to sustain the objection.

Mr. Rollins: I call your Honor's attention, that was the specific question asked of this witness. He said, did you make that statement. He still said it is true, yet he said he was not fooled.

Mr. Grimes: I did not ask him that.

Mr. Rollins: Yes, you do. That is what the effect of your examination is. I am trying to inquire whether the effect was his when he made that statement, or did he calculate it to have that effect on an unwary public.

The Court: I do not think there is enough to allow that.

Q. Advertisements by banks use the statement interchangeably, advertising for accounts, compound interest [fol. 113] accounts, special interest accounts, thrift accounts, are those terms used generally by National banks, savings banks or both?

A. Those terms are used by a commercial bank, either State or National, or any institution not authorized to use the word "savings."

Q. Do you know any savings bank using any of those in advertising terms?

A. No.

Mr. Rollins: No further questions.

Mr. Grimes: No further questions.

Mr. Rollins: I now offer negative certificate of the State of New York Banking Department certifying that the defendant is not authorized to do a savings bank business or savings and loan association business in the State of New York.

The Court: Any objection to that?

Mr. Grimes: None whatsoever.

The Court: Mark it.

(Received in evidence and marked Plaintiff's Exhibit 33.)

Mr. Rollins: I offer in evidence certificate issued by the Comptroller of the Currency of the United States evidencing the incorporation of the defendant corporation, the original of which is annexed to the motion papers for a temporary injunction as part of the file record. I ask the photostatic record be marked in evidence. This was in 1926, challenging the constitutionality of the act of 1872.

Mr. Grimes: I have no objection to this at all, photostat or otherwise.

[fol. 114] Mr. Rollins: I also want to offer—

The Court: Mark it.

(Paper received in evidence and marked Plaintiff's Exhibit 34.)

Mr. Rollins: I offer in evidence change of name of the defendant corporation from Franklin Square National Bank to Franklin National Bank of Franklin Square, by certificate of the Comptroller of the Currency and certification thereof by him, the original of which is on file with the motion papers for a temporary injunction. That is with the filed papers in the County Clerk's office.

(Paper received in evidence and marked Plaintiff's Exhibit 35.)

MOTION TO AMEND COMPLAINT AND RULING THEREON

Mr. Rollins: The plaintiff moves to amend its complaint to conform to the proof.

Mr. Grimes: I oppose the motion, unless I know in what respect.

Mr. Rollins: I ask for leave to amend. The defendant cannot be injured or harmed. He has been fully advised in a bill of particulars furnished pursuant to his demand.

Mr. Grimes: What is the motion?

Mr. Rollins: To amend the complaint to conform to the proof.

Mr. Grimes: In what respect? Withdrawing?

Mr. Rollins: No, adding to, I believe.

[fol. 115] The Court: Suppose, when you have time to do it you prepare your amendment, whatever it may be, and we will take it nunc pro tunc and I will rule on it nunc pro tunc. I do not think there is going to be any objection to it

because they do not want to go all over this thing again because of any particular omission in the pleadings. They are here now to meet this thing in a frontal defense.

Mr. Rollins: I move to amend the complaint to include these additional paragraphs and provisions. That by reason of the facts—

Mr. Grimes: May we know?

Mr. Rollins: I am going to ask that paragraph 9 be considered 10 and that in lieu of paragraph 9 I substitute the following paragraph in the complaint, so that it will be an insert, so that the last paragraph of the complaint stating the plaintiff has no adequate remedy at law be the last paragraph of the complaint. I move to amend the complaint by inserting the following paragraph between 8 and 9 of the complaint.

The Court: To be known as paragraph 8-A.

Mr. Rollins: That the acts complained of as hereinbefore alleged violated the provisions of Section 258, subdivision 1, of the New York State Banking Law, because the defendant, Franklin National Bank had no power to engage in business as a savings bank in the State of New York and that the [fol. 116] defendant, by the acts complained of has practiced fraud and deception on the public by sign, representation and by advertising for savings accounts, in advertising for savings accounts, using the prohibited term, saving or savings, and in the use of such terms in its dealings with the public, the defendant not only committed a public nuisance but usurped the rights and franchises reserved exclusively for savings banks and savings and loan associations authorized to do business as such in the State of New York under the provisions of Section 258, subdivision 1 of the New York State Banking Law.

Now the plaintiff rests.

The Court: Any objection?

Mr. Grimes: We will simply deny each and every allegation contained in the amended complaint in paragraph 8-A.

The Court: The motion is granted and the denial will be accepted as if it were in the answer.

Mr. Rollins: Plaintiff rests.

The Court: If you want to call your witnesses before you make your motion, that will be all right.

Mr. Grimes: I would like to call Mr. Schoen. I am calling him out of order.

[fol. 117] EUGENE SCHOEN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 69 Washington Place, New York City.

Q. What is your business, Mr. Schoen?

A. I am an architect.

Q. How long have you been an architect?

A. Forty-five years.

Q. Where did you take your professional education?

A. Columbia University.

Q. State your degree?

A. In 1902 as Bachelor of Science, Architecture.

Q. Did you study abroad?

A. I studied in Vienna for about six months.

Q. After that what did you do?

A. After that I came back to America and got a job with a number of architects and in 1906 began practice myself.

Q. With the exception of World War No. I have you been practicing architecture since that time?

A. Consistently.

Q. Have you done considerable department store work?

A. I have.

Q. For whom? If you will, name some of the more prominent department stores.

Mr. Rollins: I will concede this man's qualifications as an expert builder; fine reputation. I know him personally.

Mr. Grimes: I would like to get his experience on department store architecture. I think it will be very brief.

[fol. 118] The Court: All right.

The Witness: I have done interior designing, exterior designing for concerns like Martin's in Brooklyn, Marshall

Field in Chicago, Kaufman in Pittsburgh, Stern Brothers in New York, Macy in New York and a number of others.

Q. Have you also done some theatre work?

A. Yes. I did the Centre Theatre for Mr. Rockefeller in Radio City.

Q. Have you also done some bank work?

A. About 60 banks throughout the United States.

Q. Did there come a time when you were called as a consulting architect in connection with reconstruction work by the Franklin National Bank?

A. There was a time.

Q. Will you state what the circumstances were?

A. Mr. Roth, president and Mr. Carlson, an architect came over to my office and propounded a rather interesting problem to me that they seemed to find a little difficulty in getting a correct solution for in which they explained to me they wanted an interior design, even exterior design to their bank which would combine the idea of a bank and department store, and that I had been recommended to them by the Manufacturers Trust Company as a person who might help them in that respect.

Q. Did you accept the commission?

A. I did.

Q. Did you do architectural work? That is to say, did you make a design?

A. I did.

Q. Was that design accepted by the bank?

A. It was accepted and executed.

Q. I show you Exhibit 18 and ask you whether this [fol. 119] represents a portion of your own architectural work?

A. Yes. The building on the right, that is the tall building on the right known as part of No. 2 building by a previous witness, the facade, that was designed by me in my office.

Q. Have you done interior work in architecture?

A. Yes, I have done a great deal of it.

Q. Will you state to the Court briefly what your experience in that field has been?

A. I redesigned the steamship Leviathan; I have done interior——

Q. That is interior?

A. Interiors, yes; I have done interiors in offices, in wholesale manufacturing establishments, banks, commercial buildings of all kinds and dozens of residence interiors.

Q. Did you work on the interior design of the Franklin National Bank building No. 2?

A. I did.

Q. When we say building No. 2, it is true that you refer only to that portion which does not include the smaller building which appears on the right hand side of the picture?

A. That is correct.

Q. What were your instructions from the Franklin National Bank with regard to the design of the interior of building 2?

A. That I should make it look as little like a bank as I possibly could and as much like a department store as I possibly could.

Q. Did you endeavor to do so?

A. I endeavored to do so.

Q. Did you achieve the intended design?

A. I think so.

Q. You say you have designed some sixty banks?

A. Yes.

[fol. 120] Q. Throughout the country, is that correct?

A. Correct.

Q. You have been a student, of course, on architecture ever since and have seen designs, I suppose, for banks all over the world?

A. Yes.

Q. Referring to what you refer to as building No. 2, did you ever see any place in the world a bank that looks like building No. 2, either from the exterior or interior?

A. I never have.

Q. It was your deliberate purpose to make it look as unlike a bank as possible, is that correct?

A. Those were my instructions, and that was my intention.

Q. Could you state to the Court some of the ways in which that was carried out?

A. In the first place, there was a tremendously large window placed throughout the entire front of the building,

which is a characteristic of commercial buildings of all kinds, and particularly of department stores, in view of the fact there was an illuminated cornice running on the inside of the front at the second floor level with a display platform upon which I advised the bank from time to time to make displays that were illuminated at night so that people walking through the streets might see the various displays of various objects the bank was going to lend money on if they purchased them.

Q. Would that be in the second tier?

A. No, it would be below the middle line, from the middle line to the lower line.

Q. Point out to the Court where that would be.

A. It would be just slightly above the first horizontal bar and down to the top of the cornice of the show window. [fol. 121] Q. That window was built that way?

A. Yes, yes. It is that way now.

Q. Did you receive instructions with regard to street level windows how they should be made?

A. Yes. We were going to sell automobiles there, and it was important they be able to get automobiles in and out, so the main show window on the west side doorway was a movable window, they could take out and bring cars, airplanes, anything else they wanted to bring in the building to carry them through that opening, because there was no other way of getting them in the building.

Q. Were you at the opening of building No. 2?

A. Yes.

Q. Did you see airplanes at that time?

A. I saw part of one.

Q. How much of the airplane?

A. All but one wing.

Q. That was suspended from the ceiling?

A. That was suspended from the ceiling.

Q. Was there some form of hook there which enabled one to suspend that portion?

A. Yes. Throughout the entire ceiling of the bank room I had hooks installed so we could suspend displays wherever we wanted to in that room.

Q. The hooks are still there?

A. Those hooks are still there.

Q. As to counter design, was there anything unusual about that?

A. Yes, yes, the counters were display counters such as we use in department stores, in that a customer would come in, look in the display window and see merchandise that was to be sold, or credit established on, and there was no railing or no screen of any kind that separated the teller, or the [fol. 122] person who was attending to the customer from the customer himself, it was just a series of department store counters that ran around the interior of the room.

Q. Had you ever seen any such type counters in any bank before that?

A. Not that particular type of counter.

Q. Have you seen any since?

A. No, I have not.

Cross-examination.

By Mr. Rollins:

Q. You were consulted to give advice, not receive it, were you not? As an architect you gave advice?

A. I could not possibly give advice unless I knew what I was to advise on.

Q. So you say it was in resurrecting this place or renovating this place, it was your primary objective that you attain so that your work would reflect the premises, that is building No. 2, as a department store rather than as a bank?

A. A bank which had——

Q. Yes or no?

A. You cannot answer that question that way.

Q. Did you tell us that was your instruction to make it not so much like a bank, but a department store?

A. Yes, not so much.

Q. You say you made those?

A. Not as much a bank as a department store.

Q. Did you effect a department store atmosphere? Yes or no?

A. I did to a large degree, as far as it had to go.

Q. Look at Exhibit 23 and tell me if any part of that photograph suggests a department store atmosphere, yes [fol. 123] or no?

A. This portion that you see in here is a portion of the building which I had nothing whatsoever to do with.

Q. What is that?

A. That is the low extension on the side that your witness called as part of building 2.

Q. In other words, it is the extreme right?

A. It is a low extension on the west side.

Q. When did you finish your work?

A. I should imagine about three years ago, maybe longer, I am not sure, but it is about three, I should say. This portion you see up here is part of my work, but this opening, that was cut in afterward.

Q. Since the time you finished your work someone else added something to it?

A. Yes.

Q. When was the last time you saw the defendant bank premises here?

A. Several years after I completed the work.

Q. When was the last time?

A. I should say about two and a half years ago perhaps, I am not sure.

Q. So you do not know what the physical condition of the premises are today?

A. No, I do not.

Q. So, if after you completed your work, something else had been added to change the original physical purpose of your work, you would not know anything about it?

A. I would not, no.

Q. You say by looking at Exhibit 23, that was no part of your work, is that right?

A. The lower part of it, below this cornice here.

Q. Look at Exhibit 23, please?

A. Yes.

Q. Will that give the impression banking business is being conducted there?

[fol. 124] The Court: Question withdrawn. Go ahead, answer the last one.

The Witness: That lower portion is part of my work, and that is part of that counter which I designed; this portion in here, it is to that portion in the back to which I refer that I know nothing about.

Q. You mean where it says, new accounts, was your handiwork?

A. I do not see where it says—oh, well, no, then even this not part of my work.

Q. By this you refer to the counter set aside for new accounts?

A. This prominent area in front, yes.

Q. The only work you recognize on Exhibit 23 is work near the ceiling?

A. Right.

Q. What work did you do below that portion?

A. There was a wall there. When that wall was there we had exhibits there, displays of one sort and another; we had a children's alcove where children would come and make their deposits and build a Christmas fund up; we had a space for showing off an automobile toward the front of the building; that was all in that wall space. That was removed later to create this interior you see there.

Q. Will you look at Exhibit 23 again and tell me whether the tellers' windows bear the legend, savings, was constructed by you?

A. No, they were not.

Q. That was done presumably sometime after you had done your work?

A. Subsequently, yes.

Q. You do not know until this day there has been something different than what you did, is that right?

A. That is right.

[fol. 125] Q. Will you look at Exhibit 22 and tell me whether you constructed that portion of the premises in whole or in part?

A. I think this was all constructed by me, yes, all of this.

Q. Does that portion that you are looking at give the impression it is a department store?

A. Yes, yes, yes. It also of course, has a couple of windows that work into the bank, too.

Q. Tell the Court, please, what distinctive feature on that exhibit gives the impression it is a department store?

A. For example, this counter here with its little display in it, and the general treatment of it all; of course, this picture does not show all the furniture that was put around

there, it is only part of it, and it takes specifically into view two windows; that is all opened up into the tellers' section of a commercial bank. Originally when I designed the interior here, naturally if we had that, two windows here, you had to have a little check desk over here at which people could prepare their deposits.

Q. You mean that is different than any other bank?

A. This particular little corner is not different than many other banks. Yes, I would say it is very different because you never see banks that have screens in them that are not continuous, and this screen is interrupted by a wall which has display advertising on it, and it was made out of cork in order that we could put display advertising on it. That is never seen in a bank.

Q. That does not look like a bank?

A. No, it does not look like a bank.

Q. Looks like a department store?

A. Yes, for instance, like the credit account department [fol. 126] of Macy's or any other department store.

Q. Look at Exhibit 23. You say that tells anybody the story, that is a department store?

A. I would not say that looks like a bank.

Q. It looks like a department store?

A. As I say it might look like a credit department of a department store.

Q. Might look like a bank?

A. Yes, might look like a bank or restaurant, anything else you choose to make it.

Q. Looks like a restaurant now?

A. Might be a counter in a restaurant, surely.

Q. Look at exhibit 28. Did you construct any part of that?

A. Yes, I designed the entire thing.

Q. Did you also supervise and construct the physical interior there?

A. Yes.

Q. You say that gives the impression of a department store?

A. That gives the impression of a specialty store.

Q. Specialty store?

A. Any store which sells things is called a department, specialty store, depending on the types of merchandise they sell; it looks like a store, let us say that.

Q. Anything unusual for a bank to have a store?

A. Yes, very unusual.

Q. Even in Bensonhurst?

A. Yes, I designed the Bensonhurst National Bank.

Q. You do not know of any bank in this country that occupies store premises?

A. Well, I know many banks.

The Court: Does that have any bearing? You are talking to this gentleman about new construction. You are not talking about something improvised?

[fol. 127] Q. You say it cannot create the impression that was a bank at all?

A. I would not say so, no.

Q. A person finding himself in that atmosphere would believe that he was in a store rather than in a savings bank?

A. Absolutely.

Q. You say that based on your many years experience?

A. Certainly, yes.

Q. How about the situation disclosed in exhibit 24? Would you say likewise that the atmosphere disclosed in that likewise creates the impression it is a department store rather than a bank?

A. I would say that this interior represents anything but a bank.

Q. Your answer is the same for the physical condition set forth in exhibit 25?

A. I should also say the same thing about this exhibit.

Q. Also with respect to exhibit 21, is that right?

A. No. No. 21 has a screen on it, typical of a bank.

Q. Did you do that work?

A. No, I did not.

Q. The purpose of having exhibits in back of the savings department of the defendant if you know, was intended to draw a lot of people in that place, a come-on, is that not right? In other words, it is one of the advertising methods used by this defendant to attract people, bait them?

A. I should say so.

Q. That was merely incidental to the banking business to be conducted there?

A. (No answer.)

By the Court:

Q. The question was, did you receive those instructions?

A. No, I did not receive those instructions.

[fol. 128] By Mr. Rollins:

Q. Were you advised why they wanted to use all these exhibits in back?

A. Yes, surely.

Q. Why?

A. Because they said, and I agreed with them, it was a very sound piece of banking business that where you lend money to your clients, customers to purchase articles for personal consumption it was possible for them to see what they were buying, and that is what the bank wanted to do.

Q. That is what you told the bank?

A. No, that is what the bank told me they wanted to do.

By the Court:

Q. Had you finished the answer to the question of why your client said to you they wanted to have a building as unlike a bank and as much like a department store as you could make it? Had you finished your answer?

A. I did, yes.

By Mr. Rollins:

Q. Did they also tell you they wanted to have some new advertising medium to attract people to the bank, to have them talk about it?

A. Oh, no.

Q. They just did that so people who made a deposit would know what they were buying?

A. Certainly.

Q. What did the bank sell?

A. The bank did not sell anything except loans.

Q. Can you give any sound reason why the bank should tell you?

A. Counsel, may I elaborate a little in giving an answer?

[fol. 129] The Court: Sustained: The form of the question.

Q. When you walk in this bank your conclusion is you do not think you are in a bank, you think you are in a department store?

Mr. Rollins: I withdraw the question, because it is apparent he has not been in.

Q. It is apparent to you something has been added to your work?

Mr. Grimes: I object.

The Court: Strike out the remarks.

Q. Your testimony given on direct examination was given as to your opinion as to the condition that existed two and a half years ago or more, is that right?

A. One that I created two and a half years ago.

Mr. Grimes: I object to that upon the ground it is an improper characterization of what his testimony was.

The Court: Let the answer stand. Go ahead.

Q. I have also shown you photograph, exhibit 21 of defendant's premises and you say that condition is not one of your making, is that right?

A. That is true.

Q. So your testimony was given with respect to a condition which existed, and which you created, about two and a half or more years ago, is that right?

A. Correct.

[fol. 130] Q. And you do not know what happened since that time?

A. I do not.

Q. If there had been a change as indicated on plaintiff's exhibit 21—

The Court: You asked him that before.

Mr. Rollins: I move to strike out all of his testimony, having no probative force as to the condition existing today and at the time this action was brought.

The Court: Motion denied.

JOHN R. EVANS, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 5 St. John's Parkway, Poughkeepsie, New York.

Q. What is your occupation?

A. President, First National Bank of Poughkeepsie.

Q. How long have you been president of that bank?

A. Ten years.

Q. Will you state briefly to the Court what your banking experience has been? First, state please, what is your education?

A. I am a graduate of Pennsylvania State College, A. B. degree, 1922, specialized in commerce and finance.

Q. After that what did you do?

A. I was teacher in high school, head of the commercial department.

Q. What subject?

A. Banking and economics, accounting.

[fol. 131] Q. Have you taught in the American Institute of Banking?

A. Many years.

Q. Would you state briefly what your banking career has been? When did you go in banking first after teaching? How long have you been in a bank and banking?

A. In 1923 I started banking and I have been cashier of three banks, then I was executive vice-president of another bank and also another one, same bank I am now president of.

Q. Did there come a time when you also worked for the Comptroller of the Currency?

A. Yes, I was called in by the Comptroller's office, 1933 to help them out in the re-organization of banks.

Q. In your area is your bank in competition with other banks?

A. Yes.

Q. What are they?

A. We have in our city——

Mr. Rollins: One objection at this time. The testimony sought to be elicited by this question is immaterial, not

evant to the issues presented in this case, far afield
ended to protract the issues.

The Court: I will take it, subject to a motion to strike out.
do not know what is coming, so we will treat it that way.
What is your answer? You are in competition with other
banks in your community?

The Witness: Yes.

By Mr. Grimes:

Q. What are your banks?

A. We have five commercial banks in our city; one commercial bank and one savings and loan association.

fol. 132] Q. Do you compete with them for deposits?

A. Yes.

Q. You also compete with banks in the New York area?

A. Yes.

Q. To what extent, and how?

A. Mostly on the industrial side, and also on the loan side.

Q. Poughkeepsie is how many miles from New York City?

A. About 80.

Q. People there read metropolitan newspapers?

A. Yes.

Mr. Rollins: I understand I will not have to object to all these questions?

The Court: No. You can move to strike out when we come to some point this is leading up to.

Q. Do metropolitan newspapers handle advertising of savings banks and other banks in New York City?

A. Yes.

Q. Based upon your opinion, and in your experience, have you formed an opinion as to the efficacy and usefulness of various words that are used by banks to advertise accounts which bear interest?

Mr. Rollins: Objected to, incompetent, irrelevant and immaterial.

The Court: I will let him answer.

The Witness: Yes.

Mr. Rollins: All this subject to my motion to strike out, or if this is of a particular category I suggest I be per-

mitted to object because my memory cannot—May I move on the primary question?

The Court: I cannot rule on the question of competition [fol. 133] because I do not understand it yet. You will have to keep that in your mind. That is one thing I ask you to wait for. Maybe they are going to develop the point of advertising, using those words you say are forbidden. Have not got it yet.

Q. What is that opinion?

A. Beg pardon?

Q. Based upon your opinion and in your experience have you formed an opinion as to the efficacy and usefulness of various words that are used by banks to advertise accounts which bear interest?

A. I would say yes.

The Court: The question now is, what is your opinion.

Mr. Rollins: I object on the same grounds, incompetent, irrelevant and immaterial.

The Court: I will take it.

The Witness: I operated a bank for about ten years in Pennsylvania, and we were allowed there to use the word "savings accounts".

Mr. Rollins: I move that be stricken out.

The Court: Strike that out. The question is to give your opinion, not specific instances, which means the result of your experience.

The Witness: I have found, in my experience, it is a definite disadvantage not being able to use the word "savings".

Mr. Rollins: I object and move that testimony be stricken out, incompetent, irrelevant and immaterial.

The Court: Sustained. Strike it out.

[fol. 134] Q. What words, or combination of words are used by banks in advertising the fact that they have, render to the public service, receiving deposits and paying interest?

Mr. Rollins: Objected to, not being within the issues; incompetent, irrelevant and immaterial.

The Court: Allowed.

The Witness: Interest accounts, compound interest accounts, thrift accounts, savings accounts.

Mr. Grimes: Might I ask whether your Honor has considered this witness qualified as an expert? I can go into much greater detail as to qualifications. Time is short.

The Court: He is qualified with respect to some things. It will depend upon your questions.

Mr. Rollins: May I at this time call your Honor's attention there is a National bank being charged with a violation of law. Banks cover a vast territory. He asked him about advertising of banks. Whether he means savings banks, trust companies.

The Court: He says, all banks. I can only judge that by the questions. He is qualified as an expert in my judgment.

Q. Because of the practice of your calling as a banker, and especially as president of a bank for the last ten years, have you made a study of the use of various words which are employed in ads, whether by conversation or newspaper ads or otherwise, to endeavor to persuade persons to place their [fol. 135] money in a bank at interest? Have you done that, sir?

A. To a limited degree, discussion with my staff, and people who have those type of accounts.

Q. Have you discussed the problem of the use of these words with other banks?

A. Yes.

Q. Other bankers, National bankers?

A. Yes.

Q. Have you discussed it with your employees?

A. I have.

Q. I believe you said you have. Based upon your discussions, your conversations and your experience, have you formed an opinion as to which of these various words mean most to actual or potential depositors of a bank?

A. It is my opinion—

Mr. Rollins: I object to the question, first upon the ground he is not qualified.

The Court: I am going to sustain the objection.

Mr. Grimes: May I ask the ground?

The Court: I do not think that is a question for the witness to answer. The advisability or value of the New York statute cannot be inquired into in this proceeding, and that is what the question seems to develop.

Mr. Grimes: Oh, no. May I deny that is any part of the purpose of the question? The purpose of the question is to obtain his opinion as to the value of these various words. It is our contention we are seriously harmed if we are not permitted to use the word "savings" because it is the one word the public seems to understand best. These other words are not understood by the public, and we are there- [fol. 136] fore, harmed in our banking business, and it is for that purpose and that purpose only I am asking this question. We of course cannot challenge the advisability of the statute. We are challenging the constitutionality only, and it is part of our proof which I would like to offer. We will call many expert witnesses who will express their opinion upon the value of the word "savings", and the extent to which we are harmed if deprived of the use of the word "savings", and from the standpoint of the public there is no adequate substitute. This witness is called for that purpose, in part. That is the purpose of my question, and we intend to call witnesses to testify to the same effect. I qualified him as an expert to speak on the subject and express his opinion as to the value of these various words.

Mr. Rollins: I submit any such expert testimony is not competent or material to establish a constitutional question of law. Constitutional law is only a question of law, whether it tends to be discriminatory whether there is a United States statute superseding.

Mr. Grimes: The doctrine we invoke here is, any statute of the State which impedes or impairs or interferes in any way with the function of a Federal instrumentality, such as a National bank, is unconstitutional, and is therefore void. It is our contention that National banks are in competition with other banks. Secondly, as an essential part [fol. 137] of that competition they must advertise; third, active advertising is of vital importance; fourth, we propose by many witnesses to show the word "savings" is the only word properly understood by a large part of the public to describe, in connection with describing, the function that savings banks and National banks both render, and that since the statute purports to prohibit us from using those words, we are harmed, and seriously harmed. That is the purpose of this proof. That is my over-all purpose through

this witness, and we have quite a number of other witnesses to testify to that same general fact. This is a field in which I think we may properly produce expert testimony. It is also part of our proof to introduce testimony to show what knowledge the public actually does have on this subject. We propose to prove that the public has knowledge of the words "saving" and "savings." It goes to show the really appalling ignorance on the part of the public as to what such words as "thrift account" "compound interest account" and "special interest account" mean. It is our contention, and we offer to prove the public really does not understand those other terms; it understands compound interest to some extent, thrift and special interest practically not at all; it has no understanding of those words, and a great percentage of the public does understand the word "savings", and only by using that word can we advertise and compete on anything like equal terms with other banks. For the life of me I do not know how we can do that unless we proved it by experts, and secondly, by interviews with other people. Those are the types of proof we propose to offer on this subject, and in line, in support of our argument that this statute prohibits and hinders us in the same manner the statutes have hindered National banks in those cases where they have been declared unconstitutional for that very reason. That is our offer of proof and I submit I have qualified this witness to testify on that subject, and he is called for that purpose.

Mr. Rollins: It all boils down to the same speech, the act is oppressive. That is a matter for the Legislature, by repealing that.

The Court: I have heard argument and I make this ruling. The evidence will be received. One of the requirements placed upon the defendant to establish the unconstitutionality of the State statute under attack at law, is that the defendant show that the statute, by its prohibitions, interferes with the effectuating of the objectives of the act of Congress. The act of Congress concededly allows National banks to receive deposits, upon which they pay interest. The contention of the defendant is that, having that right, it should have the right to attract persons to make those deposits by advertising. The State has prohibited by law

[fol. 139] (Section 258 Banking Law) the use of the words "saving" and "savings" or their equivalent, in any form of banking which may be employed by defendant for the purpose of attracting the depositors to its bank, which the act of Congress authorizes it to receive. Such interference may be a question of fact, or law, or both. If it is a fact it is only proper for the defendant to adduce evidence to demonstrate in just what way, if any, the inhibitions in the statute of the State interfered with the effectuating of this plain objective of the act of Congress. The witness will answer.

Mr. Rollins: May I also ask your Honor to make a ruling, so I will understand. Does your Honor rule the Federal Reserve Act, the year 1935 is ambiguous?

The Court: I do not care to make a ruling just abstractly. There is no point in my making it.

Mr. Rollins: May I ask this. There is Federal statute——

The Court: Just a moment. I have ruled.

Mr. Rollins: May I respectfully except?

The Court: Take an exception. Do not argue that question any more. I have decided.

Mr. Grimes: May I point out we also as a matter of law, urge it is unconstitutional.

The Court: Whatever the law is overhangs every law suit. The only question is whether I should receive factual [fol. 140] evidence to support that proposition of law. The witness may answer the question.

The Witness: Hear the question?

Q. Have you formed an opinion as to which of these various words mean most to actual or potential depositors of a bank?

Mr. Rollins: May I have an objection to every question asked this witness and an exception?

The Court: You will have to do that. I do not know what they are going to ask. I will make a ruling. You may have an objection and an exception to testimony given by any witness along these lines, you may have that, but I do not know just what separate questions will be propounded.

The Witness: The word "savings" has the most attraction, and I think we are definitely handicapped competitively by not having the right to use that word.

Q. Has your bank tried to use a substitute for that?

A. Yes. We use "interest accounts."

Cross-examination.

By Mr. Rollins:

Q. Those National Banks have been formed under Section 258 of the State Banking Law which prohibits—

Mr. Grimes: I object to the question.

The Court: Start again.

Q. Those National banks of which your bank is one, has [fol. 141] conformed with State law prohibiting National banks from using such terms as "saving" or "savings" or the equivalent in the solicitation of accounts?

A. That is right.

Q. Those terms are used exclusively by National banks, is that right, terms such as compound interest, account, thrift account?

A. I would say quite generally.

Q. National banks only, is that right?

A. No.

Q. Savings banks use that?

A. No, State banks.

Q. What is that?

A. State banks, State commercial banks.

Q. A National Bank is a commercial bank?

A. That is right.

Q. Did your bank prosper during these years?

Mr. Grimes: I object.

The Court: Allowed.

Q. Did you in the last ten years increase your business?

A. Yes.

Q. Did your savings department increase?

A. Yes.

Q. The last five years how many million dollars did your bank increase?

A. Probably four million.

Q. How much was it before that time?

A. Seven million.

Q. How much was your savings account in the year 1950?

A. Eleven.

Q. In 1949?

A. Ten million five hundred, I would say.

Q. Less each year prior to 1950?

A. Yes.

Q. And number of accounts?

A. Yes.

Q. So your bank has prospered in spite of the fact it has used in its advertising and solicitation of savings accounts the term such as special interest account, is that right?

A. All banks have prospered. We have not gained as [fol. 142] much as savings banks in our own community.

Q. All National banks made money despite the fact they are restrained from using the term "savings" and do not use it?

A. Fair return on our money, on our capital.

Q. Substantially so?

A. No. I would say fairly so.

By the Court:

Q. Implicit in that last question was that no National bank uses the words "saving" or "savings", do you mean to say that? Is that so? I mean, I do not challenge the statement, but I want to make sure.

A. He is talking National banks throughout the country.

By Mr. Rollins:

Q. New York State.

A. I would say most of them use a word other than savings.

Q. That is because the statute requires it, State law?

A. Yes.

By the Court:

Q. When you say most of them use it, then some use the word?

A. I do not have knowledge of that.

Q. You must say that. In your answer before you indicated none of them did. You did not mean to say that?

A. No.

By Mr. Rollins :

Q. Are State commercial banks subject to the same Section 258 under the State charter?

A. That is my understanding.

[fol. 143] Q. They also have time deposits?

A. Yes.

Q. By time deposits is meant savings account, is that right? That is money deposited for a certain stated specific time, which bears interest?

A. That is right.

Q. All savings accounts are called time deposits, are they not, not as savings banks, I am talking about a deposit that pays interest.

A. Called interest deposit.

Q. What is a time account?

A. A time account, it is an account that bears interest.

Q. So whether money is deposited with a commercial bank, savings bank or trust company, which bears interest, it is called a time account?

A. Yes.

Q. So a deposit in a savings bank is called a time account?

A. Is called a savings account.

By the Court :

Q. A deposit in a savings bank is called a time account, is it not?

A. I would not say so, no. I would say it is called a savings deposit.

By Mr. Rollins :

Q. Did you ever read the statistics of the Superintendent of Banks of the State of New York?

A. No.

Q. You know there is an annual report, statistical report?

A. I do.

Q. Did you ever see that report?

A. I don't think I did.

Q. Did you ever see it listed as a time account?

A. I never saw it.

Q. Never saw the report you mean?

A. I never saw the report.

[fol. 144] Q. You mean to tell me in your experience as a banker and from your knowledge of banking that a deposit in a savings account of a bank is not called a time deposit?

A. I would say it is called a savings deposit.

Q. What is the distinction between a savings deposit and a time deposit?

A. No distinction, but just a different way of stating it.

Q. You said a time deposit is a deposit with a bank I assume of a stated sum of money which bears interest, is that right?

A. Yes.

Q. It is a natural function of any bank of whatever character to receive deposits and pay interest, is that right? Natural function of a bank? Elementary, is that not so?

A. Yes.

Q. That fact also exists with respect to a savings bank, no matter what you call it? Yes or no?

A. Yes.

Q. Your bank, as a National bank, has a savings department?

A. Has an interest department.

Q. Has a savings department where people deposit savings and receive interest?

A. Yes.

Q. Do they call that a time deposit account?

A. Yes.

Q. The only reason it is called a time deposit account is because it bears interest?

A. Yes.

Q. It is not recoverable on demand?

A. That is right.

Q. A checking account is one payable on demand?

A. Yes.

Q. That is the reason you call that a demand account?

A. Yes.

Q. You say there is a separate, third account, called a savings account as distinguished from a time deposit account?

A. I said an account in a savings bank is called a savings account.

[fol. 145] Q. A savings deposit in a savings bank as such under your definition of a time deposit can be considered a time deposit account, is that not right?

The Court: Are you not asking for what these men designate these things? Is that not what you are asking?

Q. You say you do not know that savings banks do not consider deposits in their institutions as time deposits?

A. I did not say that. I said I always consider them as savings deposits.

Q. How is it generally?

A. When they speak of them to me they always call them savings deposits.

Q. Never heard of them as time deposits?

A. I would not say I never heard of them as time deposits.

Q. You heard them called time deposits?

A. I don't know. I don't recall whether I have or not.

Q. Your information about the success of the savings banks generally in the State of New York, is that based on personal knowledge?

A. Personal observation.

By the Court:

Q. When you say personal knowledge, you mean from reports, so forth?

A. Yes.

By Mr. Rollins:

Q. Where did you get those reports from?

A. I received many of them from the banks themselves, from savings banks themselves.

[fol. 146] Q. How many banks?

A. Perhaps about twenty.

Q. During what period of years?

A. Period of the last ten years.

Q. You know, do you not, that a savings bank is not permitted to invest any monies or deposit monies in certain ventures that commercial banks are permitted under the law, don't you?

A. Yes.

Q. So that National banks and other commercial banks in New York State, chartered by the State, have other fields in which savings banks may not enter by injunction of law?

A. Yes.

Q. Now you feel a National bank should have an open field to compete in the field to which savings banks are restricted, is that your contention here?

Mr. Grimes: I object to that.

The Court: Allowed. Is that your feeling about the matter?

The Witness: I think we are definitely handicapped by not using the word.

Q. You make less earnings?

A. Yes, very definitely.

Q. Does not your field cover many other fields?

A. Yes. That does not prove the profit angle of the situation.

Q. You mean on the over-all National banks do not make any money?

A. They make money.

Q. Referring to your bank?

A. They make money but not in proportion to what savings banks do.

Q. What proportion is your commercial account with respect to your time deposits?

A. Forty—commercial did you ask?

[fol. 147] Q. Commercial and savings deposits.

A. About sixty percent demand deposits and forty percent time.

Q. Your profits of your business on your commercial accounts, how do they compare with monies invested in your savings account?

A. I would say we make more money from our interest department than we do from the commercial side of the bank.

Q. What percent?

A. I could not give it to you in percentage.

Q. How much did you make in 1950 on commercial accounts, in dollars and cents?

A. We do not have it broken down.

Q. How can you state you make more on your interest deposits?

A. I simply gave you an opinion.

Q. Your banking business in Poughkeepsie National bank business is it a thriving business?

A. Not thriving, ordinary.

Q. Making money?

A. Yes, we are making money.

Q. How long has your bank been in existence?

A. 1864.

Q. Has it gotten better each year?

A. No, since 1940?

Q. Yes.

A. Yes.

Q. What percentage each year?

A. I could not give you that. I don't know.

Q. When were you president of the bank?

A. About ten years ago.

Q. How about your ten year tenure in office? Did you do better than your predecessor or would you not know? Dollars and cents?

[fol. 148] The Court: Put that in a different way Those gentlemen would like to—

Q. Did the bank, that is what I meant, did the bank do better under your administration than your predecessor in the last ten years?

A. Yes. I am embarrassed to answer the question the way you state it.

Q. I do not want you to feel you are embarrassed and it is not my intention to be facetious about it. What percentage would you say in comparison with the prior ten years did the bank increase its profits in your tenure in office?

A. I would say better than three times, but I amend that by adding, due to the times.

Q. You could not ascribe it just because of Section 258 of the Banking Law, could you?

A. No.

Q. You did that despite the restriction, is that right?

A. Because of greater money supply.

Q. You made more money out of your special interest account than you did on commercial accounts despite the

fact you were not permitted to use the word "savings" in your advertising?

A. True.

Q. Do you want to conclude Section 258, the prohibition of the statute, worked a hardship on your bank?

A. I do.

Q. Despite the fact you increased business, made more money in your special interest account?

A. Yes.

By Mr. Grimes:

Q. Would you state why you did have this increase in [fol. 149] business? And increase in making money, profits?

A. Due to the increase in the money supply, the greater amount of money that industry demanded to carry on business, due to inflationary aspects.

Q. It was an inflationary era, was it not?

A. Yes.

Q. In your opinion your profit would have been greater had you been permitted to use the word "saving"?

Mr. Rollins: That is speculative.

The Court: He already answered that. He said it would.

Q. Do you know what, during the period of the past ten years the rate of interest, savings bank has been?

Mr. Rollins: I object. Not qualified to answer that.

The Court: I would have to sustain the objection. That would be hearsay. I think you could prove that another way by some report.

Mr. Grimes: Yes.

Q. Would you subscribe to the course the Superintendent of Banks pursued or not?

A. (No answer.)

By the Court:

Q. Would you recognize the report if you saw it?

A. Yes.

Mr. Grimes: Would you concede this is a report of the Superintendent of Banks of the State of New York?

[fol. 150] Mr. Rollins: I assume, if you say so. If you say it is, I will accept your word.

Q. I would just like you to look over this particular page and see whether or not you do not find the word saving and other kind of deposits in Schedule 1 on page 24 of the annual report of the Superintendent of Banks, year 1949, find that to be a summary of savings banks as such?

A. Yes.

Q. You find the Superintendent of Banks in that report refers to them as time deposits and savings deposits, making the distinction?

Mr. Rollins: This witness could never know, because he says he never saw a report.

Mr. Grimes: May I show that to the Court, please?

The Witness: I just read it.

The Court: Is there objection to that?

Mr. Rollins: Yes.

The Court: Sustained.

Mr. Grimes: No further questions.

Mineola, New York, January 25, 1951.

Trial Continued

MOTION TO DISMISS THE COMPLAINT AND RULING THEREON

Mr. Grimes: If your Honor please, we have a motion. For the purpose of this motion we respectfully request you disregard the testimony of the two witness- who testified last [fol. 151] night on behalf of the defendant. At this time the defendant moves that the complaint be dismissed and for judgment in its favor, upon the ground that the plaintiff has failed to make out the cause of action alleged in the original complaint and on the complaint as amended and has failed to make out any cause of action whatsoever. The specific grounds on which the motion is made are set forth in the memorandum of law which was submitted to your Honor in behalf of the defendant. For the purpose of the record, I will urge such grounds.

The Court: I do not think you need do that at this time. I am going to reserve decision on your motion, as I am going

to reserve decision on the motion at the end of the case and decide this after I have plenty of time to have your observations and your briefs.

Mr. Rollins: May I have permission of the Court to order the minutes?

The Court: I do not think I need them at this time, but I am glad you make that suggestion, and if I do you will have no objection. Up to now I have made notes as we have gone along and at the present time I do not see that I will need the minutes.

Mr. Grimes: Before we proceed, I would like to make a request that your Honor direct Mr. Seaton to remain present throughout the trial. I might wish to recall him on cross. I take it there is no objection?

[fol. 152] The Court: Mr. Seaton can be available?

Mr. Rollins: He is available, at my direction.

The Court: We do not have to have him present in the courtroom. Mr. Friedman, your preliminary statement to disregard the witness's testimony was just for the purpose of that motion?

Mr. Friedman: Yes, just for the purpose of that motion.

Mr. Grimes: We understood that was the ruling yesterday.

The Court: That is right.

HAROLD CARLSON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 38-22 219th Street, Bayside, New York.

Q. What is your occupation?

A. Architect.

Q. How long have you been an architect?

A. Got my license in 1922.

Q. Was that the first year in which licenses were required under New York law?

A. I believe it was, yes.

Q. Is it true you are one of the first architects licensed?

A. I have a low number.

Q. Beg pardon?

A. I have a low number.

Q. Prior to that time what did you do?

[fol. 153] A. Architectural draftsman, and worked in that capacity for various architects.

Q. For how long a period of time?

A. Thirteen years.

Q. Would you state the year in which you began architectural work?

A. 1909.

Q. Where did you study?

A. Cooper Union and Columbia.

Q. Architecture in each case?

A. That is right.

Q. Do you do bank work in the architectural field?

A. That is right.

Q. How long have you done banks' architectural work?

A. Oh, since 1921.

Q. What did you do then? Were you in a company of some sort?

A. Yes, I was with Townsend & — was with them for three years; I was architect for Hogson Brothers who specialized in bank work, and after which time I practiced for myself.

Q. Your three years with Denneson & Hirons?

A. That is right.

Q. What years were those?

A. 1922 to 1925.

Q. With Hogson for how many years?

A. Twenty-five to nineteen thirty-five.

Q. After that you have been practicing on your own?

A. That is right.

Q. That 19—you mean 25 to 35, is that correct?

A. '35.

Q. Will you just describe the work done by Hogson Brothers a little more fully?

A. Hogson Brothers offered complete bank service from sketches, completed plans and construction of banks, finished product.

[fol. 154] Q. They were contractors?

A. Architects, engineers and builders.

Q. What was your position with Hodgson Brothers?

A. I was architect for Hodgson Brothers.

Q. An architect?

A. I came in as an assistant and finally wound up as the architect.

Q. Have you done bank work, practiced architecture for yourself from 1935?

A. Primarily bank work.

Q. How many banks during the course of your entire career in architecture have you designed? Banks that were actually built?

The Court: Designed, or assisted in designing.

Q. Yes.

A. I would say at least two hundred.

Q. By that you understand I mean banks which were actually built?

A. That is right.

Q. You did designing work or participated in it for some two hundred banks?

A. That is right.

Q. Would you state geographically where the banks were?

A. In Hodgson Brothers we did work in I believe forty-two states, and my work was confined pretty much, pretty much, pretty nearly all of them I would say at least twenty-five states.

Q. Have you built banks on Long Island?

A. Yes.

Q. Will you name them?

A. Bayside National Bank, Queens County Savings, Franklin National, Bank of Port Jefferson, Bank of Huntington, First National of Huntington, rather.

Q. Is that under construction?

A. Under construction.

[fol. 155] By the Court:

Q. That means, have you designed?

A. Designed, supervised and gave complete supervision, not only designed, gave complete supervision.

Q. You are not a builder?

A. I am not a builder, but I supervised construction; Federal savings of Farmingdale, Woodside Federal Savings and Sunnyside Federal Savings.

Q. Hamburg?

A. Hamburg Savings.

Q. Queens County?

A. I have mentioned that, Queens County, Little Neck.

Q. Have you mentioned savings and loans?

A. Yes, I mentioned three of them.

Q. What savings and loan associations have you done?

A. Woodside, Sunnyside and Farmingdale.

Q. You have stated you did work for the Franklin National?

A. That is right.

Q. Are you their regular architect?

A. I am doing the eleventh job for them now, so I presume I am.

Q. Beginning when?

A. 1939.

Q. Incidentally, do you know of any architect in the United States who has been architect for as many banks as you have?

A. Well, I don't know.

Q. Modesty aside?

A. I do not know any in this area.

Mr. Rollins: I will concede his qualifications as an expert architect.

The Court: That helps.

The Witness: I do not know of any others locally, there may be elsewhere.

[fol. 156] Q. What did you do at the Franklin National Bank in 1940?

A. In 1939 I did enlarge the first building, the original building on the site now.

Q. Would you just state briefly the architectural, major architectural work which you did for Franklin National Bank?

A. Subsequent to that we did the garden banking at the rear, fixed up the mortgage department in the basement

and in addition, in 1945, at the rear of the building a large major addition and alteration in 1947.

Q. Would you tell the history, please, of what you refer to as a major operation in 1947, starting with your first conversation with anyone connected with the bank, telling us with whom those conversations were and what happened please.

A. Over a period of perhaps four years Mr. Roth and I had discussed the advisability, as well as the means of enlarging the building.

Q. What year was that?

A. I would say from 1942 on until the time that job was actually done.

Q. Go ahead, please.

A. At which time the property was acquired to the west of the building; we enlarged the bank about thirty feet to the west and one hundred fifteen in depth, and then put an entire new third story on the entire bank and partial fourth story.

Q. During these conversations, begin at the beginning, did Mr. Roth tell you what type of addition or alteration or both?

A. Yes. He definitely wanted the new portion to the west he wanted as he called it a department store bank, something radically different, something that would represent sales promotion and display.

Q. During the course of these discussions with him did he mention anything about his concept of a bank?

[fol. 157] Mr. Rollins: I object.

The Court: Sustained. Hearsay.

Q. Did you submit sketches to Mr. Roth?

A. I did, numerous sketches.

Q. Did there come a time when you had gone as far as you felt you could in submitting sketches to him?

A. That is right.

Q. Did you submit a sketch portrayed by this document which I now ask to be shown to you?

A. Yes.

Q. Is that a true representation sketch form of the design you submitted?

A. Yes, I submitted this sketch.

Mr. Grimes: I am going to offer this in evidence at this point.

Mr. Rollins: I am going to object to it; has no probative value in this litigation. It is not the sketch submitted, it is what it is actually today when the acts took place.

By the Court:

Q. Was this developed?

A. The architecture of the wing is entirely different today.

The Court: I think I will receive it in evidence. It shows the evolution of the bank, although it was never put into effect.

Mr. Grimes: Merely for that purpose, sir.

(Paper received in evidence and marked Defendant's Exhibit A.)

[fol. 158] By Mr. Grimes:

Q. Please continue and tell the story of the design of that bank, with the use of that sketch. Then what happened?

A. Mr. Roth was not satisfied with that, he wanted something that was radically different, something of a nature, entirely radical design which I was unable to give him, and that is how Mr. Schoen came into the picture as consultant on that particular room, and for the facade of the building.

Q. Did Mr. Roth comment on the design which is Defendant's Exhibit A?

A. Yes.

Mr. Rollins: I object and move the answer be stricken out, what comment was made on something that never came into being. I ask it be stricken.

The Court: I will have to sustain the objection.

Q. Did Mr. Roth object to this design?

A. He did.

Mr. Rollins: Same motion.

The Court: Sustained. Of course, you have it in the record. Was it ever produced, and he said no.

Q. Did Mr. Roth request any time, any recommendation from you as to obtaining the services of a consultant?

A. Yes, he did.

Mr. Rollins: That is objected to.

The Court: I will have to sustain an objection to a conversation between him and Mr. Roth.

[fol. 159] Mr. Rollins: I ask the answer be stricken out.

The Court: Strike it out.

Mr. Rollins: May I ask the witness be admonished?

Q. Was there a consultant?

A. Yes, there was.

By the Court:

Q. Did you pay him, or the bank pay him?

A. It came out of my fee.

By Mr. Grimes:

Q. Did you check the qualifications of the consultant before he was engaged?

A. I did. Yes, I did.

Q. What qualifications were you looking for as a consultant?

A. Definitely a department store architect.

Mr. Rollins: It is protracting the issues, prolonging this record. We are concerned with conditions prevailing today.

The Court: I think you are right, Mr. Rollins, but counsel has in mind a point that he wants to develop and perhaps we will go along a little bit further on that. But really counsel is right about it. This is somewhat afield.

Mr. Grimes: May I offer proof on this point?

The Court: That consultant has testified, has he not?
[fol. 160] Mr. Grimes: Yes. We called him out of order.

The Court: Yes. He testified. He said all the things that could be said; said he was an expert on banks, and he was brought in for that purpose. He said they wanted a building that looked more like a department store than a bank.

Mr. Grimes: Mr. Schoen's testimony was he had done a large number of department stores. It does seem to me that instructions given by Mr. Roth to this witness would be admissible under the issues of this case, where the charge still is, deliberately making this look like a savings bank. I am offering it on those.

The Court: The instructions would be, but they must come from the lips of Mr. Roth.

Mr. Grimes: I would think, he being a regular architect might state what his instructions were in connection with his engagement.

The Court: No. That would be a direct violation of the hearsay rule; I think the instructions will be received, what instructions he gave to him, I will take, but I think it should come from Mr. Roth. I think, under those circumstances, particularly with that objection, they ought to come from the one who gave the instructions.

Mr. Grimes: Very well. We intend to produce that at a later date.

[fol. 161] By Mr. Grimes:

Q. Had Mr. Schoen to your knowledge, specialized for some years in department store work?

A. Yes.

Q. And he was engaged, and became co-architect with you in the design, is that correct?

A. That is right.

Q. Did Mr. Roth give instructions to both of you, that is you and Mr. Schoen, as to the type of building he wanted?

A. He did.

Q. What were those instructions?

A. Definitely wanted something radically different from a bank, he wanted a department store type bank.

Q. Did you work together with Mr. Schoen?

A. I did, yes.

Q. Mr. Schoen's design was ultimately accepted, is that correct?

A. That is right, it was.

Q. Did you supervise the construction?

A. Yes.

Q. Of the new addition and alteration?

A. The entire job, yes.

Q. Were instructions given by Mr. Roth to you and Mr. Schoen as to the interior, of the type of interior?

A. Yes. He wanted a modern interior, in the vein of a department store.

Q. Were instructions given with reference to merchandise and display?

A. Yes. He wanted displays.

Q. I show you a document and ask you whether this was prepared by you?

A. Yes, that is my idea. I prepared this.

Q. Will you state to the Court what that document is?

A. This is a complete layout of the addition, what we call the westerly addition to the existing building.

[fol. 162] Q. You were in court yesterday?

A. I was.

Q. You saw the pictures that were marked, did you?

A. I did.

Q. You saw what was marked building No. 2?

A. Well, that building No. 2 does not register anything with me at all, because there is no such thing as I know.

Q. I show you exhibit 18 and call your attention to the facade of a building marked No. 2 by the court.

A. Yes, that is the plan of that portion.

Q. You have before you a sketch of the ground-floor?

A. That is right.

Q. Which you have prepared recently?

A. Yes, that was done quite recently.

Q. Is that an accurate sketch of the ground plan of building No. 2 as it is now?

A. As it is now, that is right.

Q. And as it has been for the past year?

A. For the past year.

Q. It has been that way at least since January 1, 1950, is that correct?

A. Oh, yes, even a little prior to that.

Q. Are all the notations on that sketch yours?

A. They are all mine.

Mr. Grimes: I offer that in evidence.

Mr. Rollins: May I look at it? I object to this exhibit on the ground this witness's statement as to the business conducted at the bank is something he knows nothing about, as to present conditions. There has been no proof adduced he knows anything about various departments. He even puts a desk there and chairs. He just describes what type business is being conducted in these various corners.

[fol. 163] Mr. Grimes: There being an objection I merely ask this be marked for identification at the present time.

Mr. Rollins: This is a plan this witness has prepared for the purpose of this trial, upon the existing conditions complained of.

Mr. Grimes: That is correct.

By the Court:

Q. Is it what you saw there when you were there?

A. That exists. Every bit of furniture in there is where it belongs.

Mr. Rollins: There are counters in that exhibit with reference to the type of bank business conducted, something beyond this man's personal knowledge, must have come from information furnished by somebody.

The Witness: I disagree with that. I do know the types of business.

By the Court:

Q. Do you understand the types of business transacted by the Franklin National Bank?

A. I do.

The Court: Your objection does not run to everything here?

Mr. Rollins: No, physical layout I have no objection but his comment as to the fact business was conducted at various parts of that exhibit.

Mr. Grimes: I intend to call another witness as to the type of the business done there, and I will be satisfied to [fol. 164] mark that for identification at the present time. That will shorten the proceeding.

The Court: Mark it for identification for the present.

(Paper marked defendant's exhibit B for identification.)

Q. Mr. Carlson, are you prepared to testify as to the total floor area on exhibit B for identification?

A. I do.

Q. Occupied by what I shall call personal savings alcove?

Mr. Rollins: I object to reading from something not in evidence.

The Court: I will allow the question.

The Witness: I do.

Q. You know the total area of that savings alcove?

A. Yes, I do.

Q. What percentage does that savings alcove bear to the entire ground floor area?

Mr. Rollins: I object to the question upon the ground that the basis of the answer, based upon matters of savings business conducted, is beyond the comprehension and understanding of this witness or his knowledge. He is being questioned about something he doesn't know anything about.

The Court: The question is all right. That is something for you to develop on cross examination. Give us the percentage.

[fol. 165] The Witness: As I recall, it is 14.6 percent of the entire area.

Q. Is devoted to what?

A. To savings.

By Mr. Grimes:

Q. Would you mark on this sketch, please, exactly what portion of the building you refer to?

A. (No answer.)

By the Court:

Q. Will you state what you have done?

A. I have designated the entire savings area with lines and put a red cross in the entire area, and indicated in red the check desks that are used by the savings department. And also the portion of the center desk which is used for new accounts in the savings department.

Q. These which you have indicated are approximately 14.6?

A. That is right, a little under 15 percent. I believe it is 14.6. I have it, indicated right there.

Q. State what your computation shows, please.

A. The large area comprises 594 square feet, and the new accounts portion 56 square feet, which is a total of 14.5 percent of the entire area, total of 650 square feet.

Q. As to that large portion which is marked in red, when was that built?

A. 1948, started in 1947.

Q. Construction was completed about how long after the other portion shown on that sketch?

A. A year and a half, I believe it was.

Q. Would you state what happened in that respect?

A. Well, we acquired the building adjoining the existing [fol. 166] bank at the west and broke a hole through the wall between the two buildings, raised the floor of the adjoining building to the west into which we created a space for I would say approximately half of it which was used for savings and the other half for display purposes.

Q. When that part of the Franklin National Bank was originally built, leaving out the present savings department, where was the savings department when the bank began to do any business in the new addition?

A. It was over on the east side of that large room, in with the commercial work.

Q. Would you please mark on that sketch just where it was?

A. (Indicating.)

Q. In what form, will you describe to the Court, please, did the then savings area consist of? What was it?

A. There were originally three arched windows in the old west wall of the bank, one of which, at the northerly end, was cut through for passage into the newer portion, and the other two arches were transformed into four windows for savings and various types of banking.

Q. In which part of the bank, family or commercial side, did the tellers actually stand?

A. They stood in the original building.

Q. That is, in the commercial side?

A. In the commercial side.

Q. Their windows faced into the family lobby?

A. Into the family lobby.

Q. Was that the situation up until the time when the savings alcove was added?

A. Yes.

Q. That was sometime in 1948?

A. '48, 1948.

Q. I show you a brochure and ask you whether or not this brochure contains pictures of the Franklin National [fol. 167] Bank of Franklin Square, as it is presently called, as regards the original building, the next subsequent build-

ing and various alterations, and alterations up to the time of the completion of what we have called building No. 2 here?

A. Yes, that is it.

Mr. Grimes: I offer that in evidence.

Mr. Rollins: I object to it. It has nothing to do with the present condition of the structure or its appearance to the public.

The Court: What is the purpose of the offer?

Mr. Grimes: The purpose of the offer is in connection with the charge, which is still before the Court, and especially by the amendment yesterday, that we have deliberately embarked on a course of conduct to deceive and defraud the public; also to show especially in connection with that charge that the development of design of this bank was in line with a department store concept, and its natural growth.

The Court: Mark it.

Mr. Rollins: I do not know what subject is being discussed here. Does your Honor take it for everything?

The Court: I will take it for everything.

Mr. Rollins: Including the language in there?

The Court: Yes. If you find anything in the language which is prejudicial, I mean, unduly prejudicial, I will reconsider that particular language, but as I have glanced through it it is just a brochure of a bank, its methods, its [fol. 168] objects, pictures of the interior, trying to give a general appearance of what a bank is, for the purpose, without doubt of attracting people to come to the bank to make deposits.

Mr. Rollins: May I say this in support of my motion? What the intention of the officers or management of the bank was prior to the time complained of, can have no probative force upon their acts.

The Court: What do you mean by the time complained of?

Mr. Rollins: Between 1947 and a date dealing with outright publication, whether the words saving or savings were used.

The Court: Do you make the specific charge in your pleadings that these acts were committed within a certain period? I think you do. Maybe you would know.

Mr. Rollins: Yes, I do. That would be about the year 1947.

The Court: All right. I think maybe your objection is worth considering. We ought to have another question. When was this brochure issued, could we ask the witness that?

Mr. Grimes: I have asked the witness whether that represents the actual architecture——

The Witness: It does, at that time.

By the Court:

Q. When was that brochure published?

A. That was published when that job was completed, as I recall, in 1947.

[fol. 169] Q. Could you say early or late?

A. I believe it was early 1947, around, as I recall, around May of 1947. I think that is the time.

The Court: I will receive the brochure in evidence, because your charge begins along about the year 1947, so any part of the year 1947 would be a proper period in which the defense should be allowed to offer evidence to show its attitude toward the charges made against it by publications, particularly.

(Paper received in evidence and marked Defendant's Exhibit C.)

By Mr. Grimes:

Q. Based upon your entire experience in the field of architecture, and based upon all the designs that you have made as an architect for banks, and based upon your entire study of the subject of architecture, will you express your opinion as to whether the Franklin National Bank as constituted, on the completion of building No. 2 and also upon the completion of the westerly part which we have called the savings alcove, looks like any other bank in the United States?

A. No, it does not.

Q. Whether that bank be a commercial bank or savings bank?

A. It is my opinion, radically different.

Q. From any other bank, is that correct?

A. Yes.

[fol. 170] Cross-examination.

By Mr. Rollins:

Q. When you say radically different from any other bank, you mean physically, is that right?

A. What do you mean by physically?

The Court: Strike it out and start all over.

Q. You do not claim to be sufficiently versed in banking to give an opinion on banking business, do you, which I understand as bank operation, you are not qualified to give an opinion as an expert on banking?

A. Not an expert, no, of course not.

Q. Your expert career and ability stems from the fact you were schooled in architecture, is that right?

A. That is right.

Q. You are not going to deny, are you, this particular bank, Franklin National Bank, concerning which you have testified, looks like a bank?

A. You are talking now about building No. 2?

Q. Physical structure.

A. It does not, no.

Q. Doesn't look like a bank?

A. No, it does not.

Q. So if a person came in the building and looked around at the pictures and structural condition he would think he was in a department store, is that right?

The Court: Wait a minute. You cannot say what that person would think.

Q. You say walking in there and looking at the physical surroundings there you would think it was a department [fol. 171] store?

A. I said it looks like a department store.

Q. Does it look like a bank?

A. No.

Q. Not at all?

A. No.

Q. Has no semblance to a bank at all?

A. No. Of course, there are wickets for tellers.

Q. You would find tellers' windows, would you not?

The Court: Wickets. Physically add that to the witness's answer.

By Mr. Rollins:

Q. Let us take R. H. Macy Company. Did you ever visit R. H. Macy Company?

A. Yes.

Q. That, your associate said, he helped build.

A. (No answer.)

Recess to 2:15 P. M.

AFTERNOON SESSION

Mr. Grimes: I would like to have a conference at the bench.

HAROLD CARLSON, resumed the stand and testified further as follows:

Cross-examination.

By Mr. Rollins (Continuing):

Q. I believe when we adjourned last I asked you whether or not you were acquainted with the physical layout of R. H. Macy & Company in Manhattan, New York City.

A. In general, yes.

[fol. 172] Q. Were you present yesterday when your associate Mr. Schoen said he constructed that edifice?

A. That is right, I was.

Q. You, yourself visited those Macy premises, did you not, from time to time?

A. Yes.

Q. Recent dates?

A. I have been in there time and again.

Q. You know the physical layout of the ground floor of the store premises?

A. In general.

Q. Did you ever see a wicket of a teller's cage similar to that in the Franklin National Bank?

A. Yes, in all refund departments.

Q. On the ground floor?

A. I believe there is one on every floor.

Q. You are sure of this? This is on the ground floor?

A. I think there is one on every floor, Macy's which is a department wicket.

Q. How big would you say the cage is?

A. I never measured, I have no idea. Big enough so one person can conveniently work in it.

Q. A little cage?

A. That is right, with a window in it.

Q. Like a ticket window of a railroad station?

A. No.

Q. Do those cages have signs, for savings account over the window?

A. I don't believe I saw anything like that in it.

Q. Does the word, saving or savings, over a window in any establishment indicate anything to you?

A. Yes.

Q. What does it indicate to you?

A. Savings window.

Q. If you found a number of them in an establishment would it not lead you to believe there was a savings [fol. 173] bank?

A. No, it would not. It would indicate savings in that particular portion of it.

Q. You mean just savings or what?

A. Savings account.

Q. Savings account would not indicate to you it is a bank of some kind?

A. That is right.

Q. It would indicate it was a bank?

A. That portion of it, yes.

Q. Is it not passing strange with respect to the reason that a corporation engaged in the banking business should want its establishment not to look like banking business?

Mr. Grimes: I object.

The Court: Argumentative. I will have to sustain the objection.

Q. You were ordered to build a bank, were you not?

A. I think I made myself clear.

Q. Were you not hired to build a bank?

A. I was hired to build—

The Court: Just answer yes or no.
The Witness: No.

By Mr. Rollins:

Q. You were hired to build a——

The Court: You are using the word, build. Design.

Q. Were you hired to design a bank of some sort?

A. For whom?

[fol. 174] Q. For the defendant in this case, building No. 2, exhibited in Exhibit 18?

A. No.

Q. Were you hired by the defendant to design a department store? Yes or no?

A. I don't understand the question.

Q. Were you hired?

A. (No answer.)

The Court: You can say yes or no or I cannot answer that.

The Witness: All right. I cannot answer it.

By Mr. Rollins:

Q. You cannot answer whether you were hired by the defendant to design——

The Court: He cannot answer yes or no.

The Witness: Yes or no, I cannot answer.

Q. You were hired to design for the defendant a bank or portion of a bank building for the operation of a bank.

The Court: That is not the question. The last question was, were you hired to design a department store.

Q. Were you hired to design a department store?

A. No.

Q. You knew that the defendant, Franklin National Bank was a banking institution, did you not?

A. Yes.

Q. They were engaged exclusively in the banking business at those premises?

A. Yes.

[fol. 175] Q. They knew you were a specialist in construction of banks?

A. That is right.

Q. Your associate, Mr. Schoen, whom you recommended, was also a specialist according to his and your statement? He, too, was a specialist as an architect in designing banks?

Mr. Grimes: I object to that, contrary to the record.

The Court: I will allow him to answer. Is that correct?

The Witness: Partially so, yes.

Q. Don't you consider yourself a specialist in the construction of banking institutions?

A. That was not the last answer. You asked me about Mr. Schoen.

Q. I am asking about yourself.

A. I do, yes.

Q. That is your specialty?

A. More or less, yes.

Q. When persons hire you, they hire you as a specialist to construct a bank?

A. That is right.

Q. And Mr. Schoen, according to your knowledge, is also a specialist in the construction of banks, is that not right?

A. No, he is not a specialist in banks.

Q. Were you here yesterday when he said he was?

A. I was. He did not say that.

Mr. Grimes: I object.

The Court: Sustained. Strike it out.

Q. To your knowledge did the Franklin National Bank now or any other time ever sell any merchandise?

A. No.

[fol. 176] Were you told by Mr. Roth when you were there to construct this addition, that is No. 2 on Exhibit 18, that he intended to use it for his banking business?

A. (No answer.)

Q. The defendant banking business, I should have said.

A. Banking business, yes.

Q. When you said that the portion occupied by the defendant for its savings deposits or business was limited to 14.6 percent, did you take into consideration merely that

portion leading from the entrance to the cages or wickets as you called them?

A. No, that is thrown into lobby.

Q. You did not take that into consideration?

A. I took in consideration a percentage of the lobby which is used by everyone.

Q. When you are talking about the savings account department did you take into consideration the lobby as you term it?

A. No, because it is not used for savings.

Q. Did you take into consideration the aisles leading from the various departments in building No. 2 shown on Plaintiff's Exhibit 18?

A. What aisles? I don't know what you mean by aisles.

Q. Let me show you this. I show you Exhibit 28 and I ask you did you take into consideration that front part leading from the street?

A. No, that has nothing to do with savings.

Q. In other words, you have to pass a so-called lobby before you reach the savings department?

A. That is right.

Q. How many square feet would you say that was?

A. I have it on my drawing, whatever it is.

Q. May I have this drawing? Will this paper help refresh your recollection?

A. Yes. The entire lobby area of the entire space, of the [fol. 177] area back to the rear occupies 21.8 percent of the entire floor area.

Q. So if you add that to the 14.6 it would give you more than—

A. (Interrupting:) Why should you do that?

Q. In other words, you attempted to pro-rate it?

A. Exactly. That is the only way you can do it.

Q. That is how you arrived at 14.6 with reference to the savings account department?

A. I don't understand the question. How did I arrive at that?

Q. Tell the Court how you arrived?

A. Exactly as I have indicated on this drawing.

Q. Tell us how, without referring to the drawing, the actual space was allocated to the savings department?

A. Four feet all around the savings department windows, plus the check desks, a portion of the new accounts desk as I have indicated on this drawing.

Q. Did you make any allowance for aisles leading from the front entrance?

A. No.

Q. Or leading to various other departments in the family lobby?

The Court: If the witness would use the word, exclusively, then you and he will understand one another. 14.5 is the space devoted exclusively to savings accounts?

The Witness: That is right.

By Mr. Rollins:

Q. Actually occupied by teller windows and wickets?

A. And four feet around for the public to operate, enter corridors or aisles.

[fol. 178] Q. What is the entire area of that section in square feet of building No. 2 shown on Plaintiff's Exhibit 18? That is of the ground floor, I mean, length of this building.

A. I can total it up here easily enough.

The Court: Write it right on there and we will have it then. Put on the record the witness is noting on Exhibit B for identification——

The Witness: 44.65 square feet.

Q. Can you state by looking at Exhibit 21 whether or not the representation there shows in any respect that it looks like a department store?

A. This has nothing to do.

Q. Does that?

A. No. That looks like a bank.

Mr. Grimes: No further questions.

AUGUSTUS B. WELLER, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 190 North Hewlett Avenue, Merrick, New York.

Q. What is your occupation?

A. Bank president.

Q. What bank?

A. Meadowbrook National Bank.

Q. Where is that located?

A. We have three offices, in Freeport, Merrick and West Hempstead.

[fol. 179] Q. All in Nassau County?

A. Right.

Q. Where did you receive your education?

A. In Yale.

Q. What year?

A. 1915.

Q. What degree?

A. B. A.

Q. Did you major in some subject there?

A. I majored in economics.

Q. What did you do after your graduation from college?

A. I spent twelve years in the investment banking business.

Q. Where?

A. With various concerns in New York City; about three years in the advertising business.

Q. Where was that?

A. In New York City.

Q. After that, what did you do?

A. I accepted an engagement with the First National Bank of Merrick at that time.

Q. In what capacity?

A. As president.

Q. What year was that?

A. July, 1934.

Q. You have been president since that time?

A. That is right.

Q. The name of that bank was changed to the Meadowbrook National Bank?

A. That is right.

Q. The bank merged with other banks?

A. That is true.

Q. Have you served as an officer of the Nassau County Clearing House Association?

A. I have.

Q. What office have you held?

A. I have been a director of the Clearing House on several occasions, and I have been vice chairman, also chairman of the Clearing House Association.

Q. Would you describe briefly to the Court what the Nassau County Clearing House Association is?

A. It is an association of commercial banks in the County, [fol.180] commercial banks and savings banks in the County. The Clearing House function as generally understood, is not conducted actively at the present time. However, we do clear credits in the County, in fact, all of the loans that are made by commercial banks in the County are reported, as far as borrowers' names are concerned, and cleared with other banks in order to prevent duplicate borrowing. We maintain quite an organization for that purpose.

Q. Are all of the banks in Nassau County members?

A. No.

Q. What banks are members?

A. There are forty-nine in the County. Only two are not members.

Q. Forty-seven of the forty-nine are members, is that correct?

A. That is right.

Q. That includes one savings bank in Nassau County?

A. It does include a savings bank, yes.

Q. Would you say what that savings bank is?

A. Roslyn Savings Bank.

Q. Located?

A. In Roslyn.

Q. Did you state the position which you held in the Nassau County Clearing House Association?

A. I have been Chairman of a number of committees, if that is of interest, nominating committee, budget committee, I guess, well, a service charge committee, savings and loan associations committee, probably some others of less importance.

Q. You were Chairman of the Clearing House Association in 1940?

A. That is right.

Q. Are you a Director at the present time?

A. No. My directorship ceased at the termination of 1950.

[fol. 181] Mr. Rollins: I suggest the witness is qualified. I will call him as an expert.

Mr. Grimes: In bank matters?

The Court: I will have to hear the question.

Q. Is there competition in Nassau County for deposits of money between banks, banks paying interest on that money?

A. Yes, indeed.

Q. How would you characterize that competition?

A. Very intense.

Mr. Rollins: I object to the statement by this witness as to characterization. Only a question of competition. The Court can take judicial notice, nobody is engaged in business except for profit.

The Court: I think I will allow the question.

By the Court:

Q. Would you say keen?

A. Very intense.

By Mr. Grimes:

Q. Is there competition between commercial banks in Nassau County and banks elsewhere, other than in Nassau County?

A. Yes.

Mr. Rollins: Dealing with the same class of business, commercial business. Is the question restricted only to that?

The Court: It is not restricted at all. It says do commercial banks in Nassau County compete with other commercial banks anywhere. The answer is yes.

[fol. 182] Q. In what way do they compete with banks outside of Nassau County?

Mr. Rollins: May the record show, whether a commercial bank or any other institution.

The Court: Is this commercial? The witness has not indicated he has been identified with a savings bank as such at all. Have you?

The Witness: No.

By the Court:

Q. You are speaking exclusively about commercial banks now?

A. That it right.

By Mr. Grimes:

Q. My question, sir, I will re-phrase the question again. Withdrawn.

Q. Is there competition between National banks in Nassau County and banks of any other character outside of Nassau County?

A. Yes.

Q. Would you state what that competition is? In what way they compete?

A. They compete, of course, for commercial accounts, but they compete also for savings accounts.

Q. With what character of banks outside of Nassau County do commercial banks in Nassau County compete?

A. With savings banks in particular.

Q. You are confining your answer with respect to deposits of money, is that correct?

A. That is right.

Q. Is there also competition between commercial banks [fol. 183] including National banks in Nassau County, and banks throughout New York State?

A. Yes, I would say so.

Q. That also is in respect of competition for deposits, is that correct?

A. For deposits, yes.

Q. You state you have been in the advertising business during the course of your career?

A. That is right.

Q. By the way, is there competition between National banks in Nassau County and savings and loan associations?

Mr. Rollins: I object to that question. He would not know.

The Witness: Oh.

Mr. Rollins: Besides, there could not be any such competition under the decision, because they are a different class of banks.

The Court: I will allow it.

The Witness: Competition is particularly extreme between commercial banks in the County and savings and loan associations.

Q. Will you state in what way?

A. For time deposits, savings accounts. Competition, do you mean by what means?

Q. Yes, by what means.

The Court: That is an answer. That is another question.

The Witness: By means of solicitation, particularly through advertising, circularizing.

Q. Do most savings and loan association advertise?

A. They do, very extensively.

[fol. 184] Q. What rate of interest do they advertise?

A. They advertise in Nassau County from two to two and a half percent.

Q. Savings banks advertise?

A. Not to as great an extent; there is some advertising.

Q. Do savings banks in New York City advertise in Nassau County?

A. Yes, quite extensively.

Q. In that respect are they in competition with your bank?

A. Of course.

Q. Does your bank feel that competition?

A. Yes, of course we do.

Q. In advertising, that is to say when banks or financial

institutions of any character, advertise for people's deposits and offer to pay interest on those deposits, what terms are used?

A. I would like the first part of that question, if you don't mind.

Q. In advertising, that is to say when banks or financial institutions of any character advertise for people's deposits and offer to pay interest on those deposits what terms are used?

A. The commercial banks in the County are using the terms of special interest deposit or thrift deposit or compound interest deposit, while the savings banks and savings and loan associations emphasize the word savings, of course.

Q. During the course of your entire experience in finance and advertising, have you, especially as president of a bank, Meadowbrook Bank, formed an opinion as to the effect in dealing with the public and in competing with other banks for their deposits, as to use of these four words?

A. A very definite opinion.

[fol. 185] Q. What is your opinion?

Mr. Rollins: Objected to. It is not in the capabilities of this witness to answer and speculate as to what may be in the public's mind.

The Court: I think I will allow the answer.

The Witness: The words thrift special interest, or compound interest, are absolutely futile in appealing to the public to indicate what the word savings, would indicate with respect to savings accounts, and not only do not produce results, but they are in my opinion entirely misleading. I do not think they convey to the public, or even to those of us who work in banks, the sense of what they really mean. We are trying to indicate the meaning of the word, savings in a savings account, by using other terms which do not at all indicate what the account is.

The Court: Before you leave that, will you move to strike it out and I will reserve—

Mr. Rollins: I move to strike out the witness's answer.

The Court: I will reserve decision on that motion.

Q. What is the source of and the basis of the opinion which you have expressed?

A. My opinion is predicated upon the hundreds of contacts I have had with people dealing with our own institution, and with others.

[fol. 186] By the Court:

Q. Sum it up. In your own experience?

A. My own experience in dealing with those people and their comments.

By Mr. Grimes:

Q. Will you give to the Court your opinion of the utility and effectiveness in dealing with the public and depositors in the use of the word, savings?

Mr. Rollins: I object.

The Court: I think I will have to sustain that. The Court will have to use its own knowledge as to the effect of that word.

Q. Might I ask this question. Have you formed an opinion as to the public knowledge and understanding of the word, savings?

A. Yes.

Mr. Rollins: Objected to.

The Court: I will allow that much. He says yes.

Q. Is that opinion based on your many years' experience in banking?

A. Yes.

Q. Will you state to the Court please, what your opinion is?

Mr. Rollins: Objected to.

The Court: What is the rest of that question? Is as to that? As to the effect of the word, savings?

[fol. 187] Mr. Grimes: Yes, and the knowledge people have of the meaning of the word, savings, and its effectiveness in dealing with the public.

The Court: That is too great a division. One is his knowledge, and then the other is the knowledge of the general public.

Mr. Grimes: His knowledge and the public's knowledge.

The Court: Did you want his own knowledge of the use of the word savings? I shall allow that. Divide the question.

By the Court:

Q. The question is to give your knowledge of the effectiveness of the word savings to attract deposits? Is that it?

Mr. Grimes: Precisely.

The Court: I will allow that question.

The Witness: The word savings, if used would attract many more depositors. The word, special interest account as we use the word, does not attract the depositor.

Q. That is your experience?

A. That is my experience.

Q. From the standpoint of bankers and depositors, is there any difference between savings account and thrift account, compound interest account and special interest account?

A. There is no actual difference in the account itself, no.

Q. Each is an account in which people deposit money with a bank, and on which they receive interest?

A. That is right.

[fol. 188] Cross-examination.

By Mr. Rollins:

Q. Following the last answer, in other words, all deposits in the nature of savings which bear interest are called time deposits?

A. They are included in the time deposit category in a bank.

Q. That includes savings?

A. That includes savings.

Q. That only deals with all banks, is that right, where the term time deposit is used to distinguish that account from a man's deposit in a commercial account?

A. Yes.

Q. By demand deposits, are those payable on check?

A. That is right.

Q. How old is the Meadowbrook Bank?

A. It was established in 1905.

Q. What County?

A. Nassau County.

Q. Any particular township?

A. In Freeport.

Q. How many branches has that bank?

A. Two, main office and two branches.

Q. Where are they located?

A. One in West Hempstead and one in Merrick.

Q. The one in West Hempstead, when was that acquired by the Meadowbrook Bank?

A. In March, this last year, 1950.

Q. When was the one in Merrick?

A. Merrick was really the parent bank which was merged with the First National Bank & Trust Company of Freeport in November, 1949, and that was then made the main office.

Q. How many depositors, that is savings accounts depositors has your bank, the Meadowbrook, today?

A. I would estimate approximately 8,000.

Q. When did you join the bank?

A. In 1934.

[fol. 189] Q. How many accounts did it have then, the bank?

A. It would be rather difficult for me to say but I judge about 2,000 at that time.

Q. How many were the deposits, total deposits in savings accounts of the Meadowbrook, which is the old name, or any other name when they had those 2000 depositors?

A. The savings accounts in those days totaled twice the volume of demand accounts.

Q. How much in dollars and cents, approximately?

A. Well, I can estimate the First National Bank of Merrick rather closely; in those days that was approximately \$500,000, \$550,000, something like that.

Q. In dollars?

A. In dollars.

Q. How many depositors did you say you have today? 8000?

A. 8000, yes.

Q. How many does that mean in dollars and cents?

A. Bringing in the three offices, which were originally

three independent banks, the total today is approximately twelve million.

Q. Did you change any media of advertising to obtain those additional accounts?

Mr. Grimes: I object to that.

The Court: I allow it.

Mr. Grimes: The testimony is incompetent, irrelevant and immaterial.

The Court: I allow it.

The Witness: The substantial increase was obtained principally through the merger; the advertising was pretty much the same; we may have done more advertising. The general type was not changed.

Q. Did you use newspaper advertising in Nassau County [fol. 190] to advertise your thrift accounts?

A. No.

Q. Thrift department?

A. No. We used newspapers, but the mention of special interest account is incident in the ad., we do not advertise for them, they are very ineffective.

Q. What language did you use in those advertisements?

A. Personal loan, is what we offered, any personal loan, F. H. A. loans, mortgage, that type business.

Q. Did you ever advertise for your savings account in the same language? .

A. No.

Q. Never sought a compound interest account?

A. No.

Q. Never advertised, advising the public you had a savings department?

A. In our institutional ads. we offered that as a service; we say, special interest accounts.

Q. Did you let that department be known by a circular at all of any kind?

A. No.

Q. When you say, institutional advertising, what do you mean?

A. Institutional advertising is where——

By the Court:

Q. That is for the whole bank?

A. Yes, entire bank, you build the dignities of your banks.

Q. Did you have circulars published at all?

A. Oh, yes.

Q. With any circulars? In your commercial department you issue financial monthly statements to check depositors, depositors on demand accounts?

A. We send them statements, yes.

Q. Do you also enclose a circular saying you have——

A. (Interrupting): We never enclose a circular specializ[fol. 191] ing that one department. We have mentioned this among others.

Q. Each monthly statement?

A. Now and then, not each monthly statement.

Q. How often would you do that?

A. I would think quarterly perhaps.

Q. In what proportion, that is, dealing with your commercial accounts and your savings accounts, does your bank have deposits?

A. In proportion of each?

Q. Demand deposits, time deposits, and commercial deposits as of today?

A. As of today our demand accounts are about 110 percent of our savings accounts.

Q. In dollars and cents?

A. That is fifteen million in demand, I am speaking of individual demand accounts, not public funds, fifteen million of demand and twelve million savings accounts. That is today.

Q. How was it last year?

A. Last year we were just about even.

Q. In other words, demand accounts are increasing much more rapidly than savings accounts? How much was demand accounts approximately?

A. Last year demand accounts I would say were about thirteen million.

Q. What were time deposit accounts, savings bank?

A. Time deposit accounts I would say were around approximately eleven.

Q. Today they are?

A. Twelve in savings.

Q. How about 1948? What was the amount in dollars and cents of commercial accounts, demand accounts and those of the savings department or special interest accounts?

A. You are getting back a little far. I would rather answer in percentage. I don't remember exactly totals.

[fol. 192] Q. Approximately, more or less?

A. I have another little problem. I would have to reconcile deposits in three different units, but I would say deposits have increased in our demand accounts, have increased probably twenty to twenty-five percent., and in our savings accounts perhaps ten percent. over that period, I mean since 1948.

Q. In 1950, as of today, there is an increase of savings accounts in amount and number.

A. Totally out of proportion to the others; it is really practically a loss.

Q. We are talking now about special interest accounts. Would you say in the last five years there has been an increase in your bank as to number of accounts in special interest accounts?

A. Yes.

Q. About what increase would you say?

A. Last five years over all increase would be within fifteen percent.

Q. The number?

A. I am thinking of dollars. You have been talking of dollars.

Q. Talking about dollars, about fifteen percent?

A. Yes.

Q. How many in number of accounts?

A. That I could not tell you.

Q. How many savings banks are there in Nassau County?

A. One.

Q. How many commercial banks are there?

A. Forty-nine, I think, or forty-eight, forty-eight I believe, maybe forty-seven.

Q. What is the name of the savings bank?

A. Roslyn Savings Bank.

Q. You feel the Roslyn Savings Bank is in competition with the other forty-six commercial banks, included in which [fol. 193] is the Franklin National Bank and yourself?

A. Do I have to answer that yes or no?

The Court: No. Say you cannot answer it yes or no.

The Witness: That bank does give us competition, but the real competition is from New York banks and savings and loan associations.

Q. To your knowledge, most National banks have prospered during the last ten years, have they not?

A. Yes.

Q. Have they prospered considerably?

A. I think that is a question, is it not, that deserves comparison? I don't know what you mean by considerably.

Q. Answer it any way you want.

A. I would say that they have not prospered considerably in proportion to savings banks.

Q. How about their own banks?

A. They have made a profit, yes.

Q. A substantial profit over the years?

A. I should say in the last five years if they made a substantial profit over the preceding years?

Q. That is right.

A. I do not think our ratio of profit in our own bank has been so substantial. In proportion I think it ran about the same.

Q. How about the other forty-six commercial banks? What is your opinion with respect to the five years ending 1950 with those of preceding years?

A. I think in the last fifteen all banks have done well and their profits have been in proportion right along.

Q. In proportion to what, in percentage?

A. Well——

[fol. 194] Q. Would you say it has tripled in the last five years?

A. Tripled?

Q. Yes.

A. Oh, no.

Q. Would you say, doubled?

A. No.

Q. What percentage would you say within five years last past in comparison with the five years prior thereto?

A. Taking our County as a whole, all those banks, it would be my own opinion, without immediate verification of figures that profits have been consistently the same over the past ten, twelve years.

Q. You mean they have not made more one year than a prior year?

A. They may have made more one year than a prior, but I am taking it over the entire period.

Q. Would you say 1949 was a very profitable year for banks in Nassau County?

A. Yes.

Q. 1948?

A. Yes.

Q. 1947?

A. Yes.

Q. 1946?

A. Yes.

Q. 1945?

A. Yes.

Q. 1950?

A. Yes.

Q. In other words, National banks did a thriving business in Nassau County, did they not?

A. They did very good business, yes.

Q. You know, do you not, that commercial banks make investments that savings banks may not, under the law.

A. Well, yes.

Q. A savings bank cannot make an investment on loan money on a business deal such as—

The Court: Are you not getting a little far afield?

Mr. Rollins: I withdraw the question.

Q. People come to your bank knowing you have a savings department, do they not?

[fol. 195] The Court: Wait a minute. How can he tell us what people know?

Q. They come and ask?

A. (No answer.)

Q. Do they come in and ask whether you have a savings department?

A. They do.

Q. You are acquainted with the National City Bank?

A. Yes.

Q. They designate their saving department by the words, thrift account?

A. Perhaps, I would not know.

Q. How about Chase National?

A. I would not know.

Q. Do you know whether they do a good business in their savings department?

A. No, I do not. I am not familiar.

Mr. Grimes: I object.

The Court: Allowed. He said he does not know.

Q. You feel your bank is a successful National bank?

A. Yes.

Q. Do you feel it hampered in any way as a bank?

A. Yes.

Q. You mean only because you feel it would be more convenient to your bank if you were permitted, without restraint to advertise by using the word, saving or savings?

A. That would be very important.

Q. That would increase your business, you feel?

A. Oh, yes.

Q. That is the only reason why you feel your bank would make more money than it has?

A. I may have a lot more.

[fol. 196] Q. I am talking about that; that is the only stumbling block?

A. I will not say that is the only one; that is a stumbling block; I mean, it would be convenient if it were not there. It would be very helpful.

Q. You don't want this Court to believe you lend evidence except to help your situation, that is, of your bank as a disinterested witness?

A. Well—

Q. You are interested in the outcome of this case?

A. Yes.

Q. You are not getting paid for coming here?

A. No.

By Mr. Grimes:

Q. During the past five years have all banks and financial institutions prospered?

A. Yes.

Mr. Rollins: I move the answer be stricken out. I can understand he would know about Nassau County.

The Court: I will allow it. He has general knowledge. He is in the banking business.

Q. What about savings banks?

A. They have prospered particularly.

Q. Would you say more than commercial banks?

The Court: It does not matter to me whether they did well or did not do well. I will have to sustain the objection, whether they did a good business or not. I am not interested.

[fol. 197] By the Court:

Q. What do you mean by the expression, Clearing House? Just a minute. Why do you not want him to define that?

Mr. Grimes: I would like to know whether they helped each other or not.

The Court: I granted him permission to question the witness about the Clearing House situation, and I did not do it very properly, I am sure.

Q. What do you mean by Clearing House Association? What is the function of that association?

A. Clearing House Association was established during the depth of the depression and at that time arranged clearances between the local banks which made it unnecessary to transmit all items through New York clearing arrangement, and our New York correspondents. As conditions improved, however, that particular clearing function has grown more and more into disuse; I believe some banks do clear directly through arrangements with the Clearing House, but the real purpose of the Clearing House today, and its principal function is the clearing of credit information; I think they have, in fact, I know they have, over five hundred thousand names in their credit files, and when we have a loan application we call the Clearing House immediately, that is all

members of the Clearing House call immediately to obtain information on that particular name, and we may find he is a borrower in other banks, or has a judgment or a record of that kind; very important function.
[fol. 198] Q. It is a private business institution of bankers doing business?

A. It is an association of bankers doing business in Nassau County.

Q. And was born during the time of the depression to help one another through liquidation of loans?

A. Yes, it was.

Q. You say that function has since become unnecessary?

A. It is not used as actively as it was at that time.

Q. Is it used at all?

A. Yes, I think so.

Q. When was the last time?

A. That I would not know.

Q. How long have you been Chairman of the Board of Directors?

A. That is routine operation.

The Court: He only gave that as an indication of his education in banking.

Mr. Rollins: I want to find out, since banks have prospered, that is another thing they cannot impair, National function, since your Honor let that in, I want to show that has not become necessary. These fellows have prospered.

The Court: Maybe you did not hear, but that was just one feature that had not become necessary, that is clearing through this organization. Generally speaking, the witness said, they go back to the old form and clear their checks through the Clearing House of New York, correspondent banks which, in turn, go through—

By Mr. Rollins:

Q. You could have done that before your association if you had sufficient assets to back up your—

[fol. 199] A. (Interrupting) Assets had nothing to do with what I am talking about.

By the Court:

Q. They did do it before?

A. Yes.

Q. You returned to that method of doing business generally now?

A. Yes.

By Mr. Grimes:

Q. You said for the past five years time deposits of your bank had increased approximately fifteen percent?

A. I would say so, yes.

Q. To what extent did demand deposits increase during that same period of time?

A. I would say about fifty per cent.

Q. When people come into your bank and ask you, as you testified on cross examination, whether you have a savings department, what do you tell them?

A. Well, it is rather an awkward thing to explain, just what we do have. Of course, we tell them we have the same thing as the savings department, although it is called a special interest department; we explain to them it is the same thing. When that is not carefully explained to them, however, they seem to feel they are not doing business with a savings account, and in fact, and we have withdrawals where people explain to us when we ask them why are they withdrawing their money, they decide they need to put the money in a savings institution; that we do not have that type of service.

Q. You find a great deal of misunderstanding of what the words special interest—

A. (Interrupting) It is not understood at all.

[fol. 200] Q. (Continuing)—the word savings is?

A. Very clearly.

By Mr. Rollins:

Q. When you explain that to them, do they walk out?

A. Yes, very often.

Q. How many have you had in your career?

A. How many? Well, I cannot tell you the number. I bet I have had twenty-five or thirty.

Q. How many years?

A. In seventeen years.

Q. Could you give me the name of one who walked out?

A. Yes.

Q. Give me the name.

A. Shall I expose that name here? If it is all right, I mean.

Q. Give the name and address.

A. I don't know if I can give you the address, the lady lives in Bellmore; her name is Doux.

Q. When was that?

A. About two years ago.

Q. Have you got any other name?

A. Let us see now, yes, I will give you one, I don't remember his first name, last name is Hefflein.

Q. When was that?

A. I would say that was along about the same time, three years ago, something like that.

Q. Are they related to you?

A. No.

Q. Did you have any law suits with them?

A. No.

By Mr. Grimes:

Q. What happened with that?

A. She——

Q. Doux.

The Court: We have that. Those were the people to whom he made the explanation, and they walked out.

Mr. Grimes: No further questions.

[fol. 201] WILLIAM H. ABEL, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 460 Macatee Place, Mineola, New York.

Q. What is your occupation?

A. I am president of the Central National Bank, Mineola.

Q. How long have you been president of that bank?

A. Since the 9th of this January. Prior to that I was executive vice president for five years.

Q. How long have you been in the bank?

A. Twenty-eight years.

Q. Always with the same bank?

A. No. I started upon leaving high school, started with the National Park Bank in New York, 1923; that bank is now part of the Chase National Bank, and I believe it is the latter part of 1925 I joined the staff of the First National in Mineola as bookkeeper, and was advanced to teller; left there in 1930 to take a position with the present Central National Bank as assistant cashier, and thereafter, 1937 I was promoted to cashier and in 1945 to executive vice president, and that brings you up to date.

Q. Have you made a special study of banking?

A. I have. I have taken numerous courses in the American Institute of Banking. I am a graduate of the graduate school of banking at Rutgers, and a number of special courses at N. Y. U.

Q. Does your bank compete with other banks?

A. Oh, yes.

[fol. 202] Q. How?

A. In the solicitation of loans, deposits and the sale of our general services.

Q. What type banks do you compete with?

A. We compete with other commercial banks in the area, savings and loan associations and savings bank in New York City and Brooklyn and New York.

Q. Does your bank advertise.

A. Yes.

Q. Do most banks advertise?

A. I believe so.

Q. Are you in competition with these other banks you have mentioned for deposits of money on which you pay interest?

A. Yes.

Q. How would you characterize the competition?

A. It is very keen.

Q. Is advertising in your observation of banking insti-

tutions, Nassau institutions for people's deposits of money, on which interest is paid, on the increase?

A. I think competition is becoming keener all the time.

Q. Advertising business increasing all the time?

A. Yes.

Q. Will you tell the Court about the type of competition you receive from savings and loan associations?

Mr. Rollins: I object, incompetent, irrelevant and immaterial.

The Court: Allowed.

The Witness: The history of Nassau, and I believe a lot of other counties would probably prove the savings and loan associations have been increasing rather rapidly, both the State chartered savings and loan, as well as the Federally chartered savings and loan associations.

[fol. 203] Q. Is that your best recollection?

A. They have made vast strides over the past ten, twelve years.

The Court: The question I allowed is, were you in competition with savings and loan associations in Nassau County.

The Witness: We are.

By Mr. Grimes:

Q. In what manner are you in competition with savings bank wherever located?

Mr. Rollins: Objected to, irrelevant, incompetent and immaterial.

The Court: I allow it. You are just calling for characterizing the degree of competition.

Mr. Grimes: Yes.

The Court: I allow it.

The Witness: The reason we are in competition is because—

By the Court:

Q. Is it small, large?

A. Tremendous.

By Mr. Grimes:

Q. Are you familiar with the terms used by financial institutions when they advertise for accounts of people, and offer to pay interest on the deposit?

A. Yes, I am.

Q. What words are used?

A. Special interest, thrift, compound interest accounts, [fol. 204] and in savings banks or savings and loan associations they are permitted to use the word, savings.

Q. In giving the answer you have given, you understood I was asking you, when I asked you about competition, that I meant at all times competition for deposits on which you pay interest.

A. That is right. I answered the question in line of general competition.

The Court: Some of the questions were beyond that. He answered that.

Q. Perhaps I was not specific. In connection with competition you have with savings banks. I wish you would give that. When I ask that question I wish you would now give the answer with special reference to competition for deposits. How would you characterize that competition?

A. On deposits for which we pay interest?

Q. Yes.

A. It is also very keen.

Q. You named four words which are used in advertising for people's deposits by financial institutions.

A. That is right.

Q. Based upon your experience in dealing with the depositors have you formed an opinion as to the usefulness and efficacy of those four words when used by financial institutions in advertising?

A. Yes, I have.

Q. What is it?

Mr. Rollins: Objected to, incompetent, irrelevant and immaterial, and not germane to the issues.

The Court: You used that expression before, those four words. Which four and what do you mean specifically by that?

[fol. 205] Mr. Grimes: Relative merits of the words, savings, compound interest, special interest and thrift.

The Court: Four expressions would be better. I allow the answer, yes or no.

The Witness: Yes, I have.

Q. What is that opinion?

Mr. Rollins: That is objected to.

The Court: I allow it. Move to strike it out.

The Witness: I feel we operate under a very heavy handicap.

Mr. Rollins: I move the answer be stricken out as a conclusion, handicapped, encompasses a lot.

The Court: Opinion would be a conclusion, but I agree with you he has not answered the question, unless you go on from there.

The Witness: May I explain that?

Q. What is your opinion of the efficacy in the use of those three expressions, thrown into one group and, one savings.

A. All expressions commonly used in commercial banks are not generally understood by the public; the word savings is, and we frequently have difficulty with it. Does that answer the question?

Q. So that you would say that the restriction on your using the word, savings, is detrimental?

A. Yes.

Q. Advantageous, or what?

A. It would be advantageous if we could use, it is detrimental if we cannot.

[fol. 206] Q. The using of those substituted expressions, would say that is inadequate for the purpose?

A. It puts us under a hardship, and if I could explain that a bit further, I would like to. We frequently have people come to the bank and they will tell one of the tellers they would like to open a savings account; my tellers have been instructed to direct such people to an officer; most times we are able to sell them on the idea of accepting what we have, in some cases we are unable to do so.

Mr. Rollins: I move to strike out the last part.

The Court: I have to grant that motion. Hearsay.

Mr. Rollins: I move to strike out the entire answer.

The Court: Have you finished that opinion?

Q. Will you go on with your explanation?

A. Judge, some people are so used to the word, savings.

The Court: You lost the thread of your answer. You were treating with the efficacy of the expression, thrift account, special interest account, compound interest account as compared with using the word, saving or savings, to express those same ideas. The question was, what in your opinion the difference was, if any.

A. There is no difference in the type of account. They are handled the same way, and we pay interest on them; [fol. 207] you must present your passbook and for withdrawal the same as the ordinary savings account.

Q. How about the effect on the number of depositors you have by using those three expressions, and not being allowed to use the words, saving or savings? Could you give your opinion on that?

A. There, your Honor, it is just an opinion; I have no facts to support my opinion. I think we have lost some business, how much I do not know.

Mr. Rollins: I move that answer be stricken out, because it is speculative, we lost some business. Nothing on which it can be based.

The Court: I will let it stand.

Mr. Rollins: I want to submit all this is speculation.

The Court: I am going to reserve decision on your motion. I said so before.

By Mr. Grimes:

Q. If I understand you, it is a hardship?

A. That is correct.

Q. For you not to be able to use the word, savings, is that right?

A. That is correct.

Q. Can you be more specific about the opinion which you just expressed?

A. Just—

Mr. Rollins: I want the record to show I am not making objections, at your Honor's suggestion, but I make a motion to strike it out.

The Court: That will preserve the record.

[fol. 208] The Witness: As I told you before, we frequently have people come to the bank and ask to open a savings account. We have to tell them we do not have it.

Mr. Grimes: I withdraw the question.

Q. Can you state to what extent it is a hardship in your opinion?

A. The same problem comes up almost daily at least three times a week I would say.

Q. By that you mean people do not understand any word except the word savings?

A. That is right. We have a lot of people come out from the City, older folks.

The Court: Wait a minute. Do not go into specific instances. You are giving specific opinion. That is a conclusion of your own, that is all.

The Witness: We have a lot of people come out from New York City.

The Court: Do not give individual cases. In giving the opinion you have to put them all together and we will take your judgment and view on it.

By Mr. Grimes:

Q. What is your opinion as to the extent of the hardships?

The Court: How would you have him answer? Small? Great?

The Witness: I will say it is a considerable hardship.

Mr. Rollins: I move to strike out the witness's testimony as to the opinion expressed, dealing with the comparative. [fol. 209] The Court: All of the opinion evidence that he gave.

Mr. Rollins: Yes.

The Court: I reserve decision.

Cross examination.

By Mr. Rollins:

Q. Your name is Mr. Abel?

A. That is right.

Q. How many branches has your bank?

A. One home office and one branch.

Q. In other words, it has two banks?

A. That is right.

Q. How long have you served in your bank?

A. Twenty-one years.

Q. When you first came with the bank how many deposits did the bank have, in savings accounts?

A. None.

Q. When was the first account opened?

A. March 30, 1930; that is the day we had the grand opening.

Q. That is the time when your bank was incorporated?

A. That is right.

Q. How many savings depositors has your bank today?

A. Our individual institution?

Q. And your branch? When I talk about your bank, I mean all together.

A. About 8500.

Q. That is, how many that you have as of today, is that right?

A. Yes, it is because of the merger.

Q. When did the merger take place?

A. December 29, just past.

Q. What year?

A. 1950.

Q. How many did your bank have?

A. 4500.

Q. Talking about your bank prior to the merger, how much in dollars and cents did the deposits of the savings department aggregate?

A. Three million dollars.

[fol. 210] Q. How much were demand deposits, dollars and cents?

A. May I ask for a correction? Did you say demand or time?

Q. Time.

A. Time were three million.

Q. Demand deposits?

A. About three million four hundred thousand.

Q. In other words, in 1950 your time deposits, that is savings department was more than your demand deposits?

A. No, I did not say that. Demand deposits were in excess of the time deposits.

Q. Four million demand and three million time deposits?

A. That is right.

Q. How many depositors did you have in 1949?

A. I would say just around 4000.

Q. How many depositors did you have in 1948?

A. I could not answer that accurately.

Q. Approximately?

A. I would say thirty-eight, thirty-seven hundred, something like that.

Q. How many in 1947?

A. There again you are going to ask me to guess.

Q. I am trying to find out. There had been a gradual increase year by year in number and amount of deposits?

A. Yes.

Q. Time deposits only is savings deposits?

A. Has not gone up a million.

Q. What percent would you say was the increase?

A. In time deposits fifteen percent a year.

Q. And number of accounts?

A. Likewise.

Q. You are conversant with the rules and regulations of the Comptroller of the Currency that has jurisdiction of National Banks?

A. I hope so.

Q. Investing your commercial demand deposits and your [fol. 211] time and savings department, there are different regulations with respect to investment?

A. Yes.

Q. Is it the rule and regulation of the United States Comptroller of Currency that time deposits, that is dealing with deposits of savings that is loaned out on mortgage to the extent of 60 percent?

A. That is right.

Q. In making those loans are National banks also subject to the regulations of the United States Comptroller of Currency that any single loan may not exceed 60 percent of each piece of real estate?

A. That is right.

Q. A savings bank chartered by the State of New York making a real estate mortgage deal is not limited to 60 percent of the appraised value?

A. I believe inasmuch as they can go to 80.

By the Court:

Q. Do you know that?

A. Yes.

By Mr. Rollins:

Q. How much?

A. 80.

Q. Is it not for that reason those savings banks do a better business than National banks?

A. I don't think it is.

Q. You mean to tell this Court that if a builder goes to build and requires security, a mortgage to get 80 percent he would not prefer a loan from a savings bank?

A. We can make a loan up to 100.

Q. Provided it is guaranteed by the Government? Take the ordinary one, not secured.

A. How about the Veterans' Administration?

[fol. 212] Q. Forget about the Veterans Administration. I am talking about general business.

A. You are stuck with 60 percent.

Q. Forget about the F. H. A. end of veterans' proposition. Would you say a builder would not rather deal with a savings bank where he can get 80 percent whereas a National bank is restricted to 60 percent?

A. You are right.

Q. Is not that the reason a National bank only pays one percent on a deposit, a time deposit?

Mr. Grimes: I object.

The Court: Sustained.

Q. A savings bank pays two percent interest?

Mr. Grimes: I do not wish to interrupt cross examination ordinarily, but is it to be an issue in this case?

The Witness: Most of them.

Q. Do you know what rate of interest is currently being paid within the last five years by National banks in the County of Nassau?

Mr. Grimes: I object.

The Court: Sustained.

Mr. Rollins: Exception.

Q. Is it not a fact that the reason why savings banks can pay two percent as interest on their money, or money deposited with them on time deposit arrangement is because they obtain more business in the way of real estate mortgages because they are not hampered by 60 percent of the assessed value?

A. I don't think that is the reason.

[fol. 213] Q. What is the reason?

A. They enjoy tax exempt privilege which we do not enjoy.

Q. They have greater business, real estate mortgages, than National banks?

A. They do.

Q. Their primary concern, business, is real estate mortgages?

A. That is right.

Q. That is a mortgage secured by real estate?

A. That is right. They also enjoy tax exempt privilege which is quite a jolt to us fellows.

Q. They do a bigger business than a National bank?

A. That is true.

Q. They are limited only to that class of investment primarily, is that not right?

A. Yes, that is right.

Q. If you were to get more deposits assuming by any means, you would be able to release more of your funds, is that right?

A. That is correct.

Q. Because the greater the deposits with you the more you would be able to release for real estate mortgages?

A. That is right.

Q. Is not that primarily the competitive basis between National and savings banks?

A. The balance we put in Government bonds.

Q. Is not that the greatest source of competition, point of difference?

A. No, I would not think so.

Q. When you state that National banks experience hardship because they are not permitted to use saving or savings, you don't mean to tell me that impedes the success of the bank?

A. No. It is burdensome, though, from the angle that you constantly have to explain your position or apologize for it.

Q. It is an embarrassing position most of all?

A. That is right.

[fol. 214] Q. That is the only source of complaint of it?

A. Other than that loss of business also.

Q. That is just merely your opinion what you might have got?

A. That is right.

Q. Would not you agree with me that it would be more convenient rather than a hardship for a National bank to enjoy freedom of advertising without the restraint of Section 258 of the Banking Law which prohibits a National bank and other commercial banks advertising for the use of current savings—withdrawn.

Q. Would I be correct in interpreting your statement and opinion wherein you claim it is a hardship for a National bank by stating that you mean it would be more convenient for a National bank to be free from restraint in advertising by the use of the term savings?

A. No, I would still stick to the word hardship. It is a hardship to be restrained from using this word.

Q. When you say hardship, that has not stopped your business from growing?

A. That is true.

Mr. Grimes: I object.

The Court: Sustained. Argumentative.

Q. Your bank has increased in number of accounts, I am talking savings accounts, from year to year?

A. Yes.

Q. And in the amount of deposit, is that not right?

A. While others have increased tenfold.

Q. There are other banks who have keener leadership than your bank? I don't want to be facetious about that. Is that right?

The Court: Is there an objection?

[fol. 215] Mr. Grimes: I think the witness ought to be permitted to finish his answer, not to be cut off, this way.

The Court: Had you completed your recent answer? I think the next question will allow the witness to put in the answer he had in mind.

The Witness: That is not so.

The Court: I am going to sustain the objection. I think I will have to allow that. If they want to ascribe it to something else I will allow the question.

By the Court:

Q. Is that due to keener leadership in the other banks than you have in your bank that you say you have sustained these losses by restriction to use those words, saving and savings?

A. When I answered counsellor's question I was thinking of the tremendous growth of savings and loan associations in Nassau County.

By Mr. Rollins:

Q. You heard of the term that competition is the life blood of industry?

A. Yes, life of trade.

Q. Life of trade?

A. Life of trade.

Q. Is banking a trade?

A. It is a business.

Q. That is subject to competition, too?

A. That is right.

Q. Every business has competition, is that not true?

A. That is right.

Q. Every business success depends on the industry of individuals and originality in ideas?

A. That is correct.

[fol. 216] Q. Industry, too?

A. We are not hamstrung by regulations.

Q. Management of corporations depends necessarily upon individuals?

A. That is right.

Q. Their experience and education, is that right?

A. Yes.

Q. Their industry, too?

A. That is right.

Q. You will find there is a comparison in the banking business in the qualifications of men as in other industries?

A. That is right.

Q. Other institutions or places of business or industries prosper in comparative degree, greater than others?

A. That could be.

Q. Some banks have more assets, more earnings than others, is that not right?

The Court: I will allow it.

The Witness: That is right.

Q. Will you say the Franklin National Bank—you do not have to answer if you don't want to—has more ideas, and has given more ideas to banking in Nassau County than any other bank in Nassau County to improve and increase its profits?

A. I would acknowledge the Franklin National Bank is one of the outstanding institutions of this area.

Q. It has grown more than any other older institution of like character?

A. I believe that is correct.

Q. Is that ascribed to the personal industry and unique ability of its president, Mr. Roth?

A. That is right.

Q. Other banks in Nassau County, elsewhere, have used old methods of obtaining customers, advertising for accounts?

A. Some of them have, some of them have not advertised.

[fol. 217] Q. In other words, they sat back and waited for business to come?

A. No.

Q. How many banks have not advertised or solicited for accounts?

A. I don't know. I know mine has.

Q. How many banks without naming them would you say have not advertised at all?

A. That I would not know.

Q. That they have savings deposits?

A. Every bank does some advertising, depending on what branch of their business they wish to push.

Q. You know loaning money on interest is a natural element of the banking business at all times?

A. That is right.

Q. It is not restricted to savings?

A. That is right.

Q. It has been recognized from the beginning of time? You are acquainted with the history of banking?

A. I am, somewhat.

Q. It goes back thousands of years? The answer is what?

A. Yes.

Q. It did originally start with an individual, is that not right?

A. That is correct.

Q. Then it grew into an association and corporation, and that is the evolution of the banking business?

A. That is correct.

Q. And the first attribute of a bank is deposits of monies by people or the public with these private bankers, associations or corporations upon an agreement to pay interest?

A. That is right.

Q. So time deposits is not a natural attribute of any particular kind of business banking?

A. It is the type of banking most of the public out here desire. They are wage earners.

[fol. 218] Q. You have other business people living in Nassau County, substantial business people?

A. They are in the minority.

Q. They deposit their monies as far as you know, in banks? They do not trust Nassau County banks?

A. They do.

Q. A National bank is a commercial bank?

A. That is right.

Q. There are commercial banks under State charter?

A. That is correct.

Q. Enjoying the same type business as National banks do?

A. That is right.

Q. They, too, are restricted from using and advertising for time deposits or using the term saving or savings?

The Court: That is the law.

Q. A commercial bank under State charter is subject to the same regulations by the State Banking Department as a National bank?

A. That is right.

Q. How many commercial banks under State charter have you in Nassau County?

A. I should say about half; I am not too sure of that, though.

Q. Did you ever attend any meetings of the Clearing House Association?

A. Yes.

Q. Was this case discussed amongst bankers there, commercial banks?

A. I was not present, if it was.

Q. It became generally known about this case being tried, and the dependency of this suit?

A. There has been a little talk about it.

Q. Did you volunteer to come and testify?

A. I was discussing the case with Mr. Roth one day [fol. 219] and when I learned more of the situation I offered to come.

Q. Is this defense subsidized by any association of National bankers?

A. No.

Q. Your bank has conformed to the banking law?

A. We have.

Mr. Grimes: I object to that.

Q. In spite of the Banking Law you have made profits, have you not?

A. Yes.

JOHN J. KEUTHEN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 29 Garfield Avenue, Glenhead, New York.

By the Court:

Q. State your experience in the banking business.

A. With the Wheatley Hills National Bank since June, 1920, and prior to that I was for six months with the Bank of Westbury Trust Company.

Q. What position do you occupy now?

A. President.

Q. How long have you been president?

A. Since January, 1936.

Q. That is Wheatley Hills?

A. That is Wheatley Hills National Bank, Westbury.

[fol. 220] Q. Actively engaged in that business daily?

A. All that time.

Q. Have you been in the court room while Mr. Weller, Mr. Evans and Mr. Abel were on the witness stand?

A. I have.

Q. Could you hear the questions put to them and the answers they made?

A. I could.

The Court: Object to this, if you want to.

Q. Would your answers be substantially the same as the answers made by them to the questions put first by Mr. Grimes, then by Mr. Rollins? Would they be substantially the same?

Mr. Rollins: I object on the ground it is incompetent, irrelevant and immaterial, and upon the other grounds I stated with respect to testimony and the opinion given.

The Court: We can do this if he answers this question in the affirmative, then I will entertain your motion to strike out his opinion evidence if that will cover you. How would

you answer that question? Would your answers be substantially the same as the others?

The Witness: I would have to qualify it, your Honor, in respect to increase of savings business which we have not had during the past few years.

By the Court:

Q. In other words, you say your savings department, whatever you call it, has not increased in the last— [fol. 221] A. Since 1948 we have decreased.

Q. Aside from that, would your answers be substantially the same?

A. Substantially, your Honor.

The Court: If this is satisfactory to both counsel, make your motion to strike out his opinion evidence, which we understand will be the same as the other witnesses and I will reserve decision.

Mr. Rollins: I move to strike out the opinion evidence given by this witness.

The Court: All of the opinion evidence?

Mr. Rollins: All of the opinion so given by this witness.

The Court: I will reserve decision on that. Does not that cover this witness's value to you?

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Grimes: I think so, sir. We have some other witnesses.

The Court: Give us the names and addresses.

Mr. Grimes: J. Wilson Dayton, Chairman of the Board, Bayside National Bank, New York, Bayside; Charles J. Machleid, president of the Peninsula National Bank, Cedarhurst, Long Island. The procedure suggested by the Court is agreeable to the defendant.

The Court: It is stipulated that if those witnesses were called their testimony would be substantially the same as that of Mr. Abel, Mr. Weller and Mr. Evans in answer to questions put both in direct and cross examination, and with respect to that testimony the Attorney General injects [fol. 222] the proviso he is not stipulating as to the accuracy or correctness of the testimony given, but the stip-

lation is entered into by him merely to expedite the trial of the case. With that before the Court you may move to strike their testimony.

Mr. Rollins: I moved their testimony be stricken from the record upon the ground it is incompetent, irrelevant, immaterial and is based upon matters speculative and without any evidence upon which an opinion may be predicated.

The Court: Their opinion evidence.

Mr. Grimes: I think we should have it stipulated they are both qualified.

The Court: That is all stipulated, unless you want to read into the record how long Mr. Dayton has been in the banking business, and Mr. Machleid.

Mr. Rollins: I will stipulate they are qualified as bankers.

The Court: They are qualified in the banking business.

Mr. Grimes: I would like in the record Mr. Machleid has been in the banking business since 1910 continuously.

The Court: How as president?

Mr. Grimes: I have a list of qualifications. I will have to run down.

Mr. Rollins: I have stipulated they are qualified bankers.

Mr. Grimes: President of that bank since 1945, and as to Mr. Dayton, he has been in the banking business since 1929, also in the real estate business.

[fol. 223] The Court: Has he been an executive of a bank for a period of time?

Mr. Grimes: Yes.

The Court: How long?

Mr. Grimes: He has been president and chairman of the Board of the Bayside National Bank since July, 1929.

Mr. Rollins: I will stipulate that is a fact for the purpose of this case only.

The Court: That is the way it is understood. On Mr. Rollins' motion I do not think I ruled. Decision reserved on his motion to strike out. What is next?

MATTHEW CHAPPELL, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 52 Stirrup Lane, Roslyn Heights, New York.

Q. What is your occupation, Professor?

A. I am Professor of psychology at Hofstra College.

Q. You head some department there?

A. Yes. I am Chairman of the Department of Psychology.

Q. Where is Hofstra College located?

A. In Hempstead.

Q. How long has it been an education institution, qualified to give degrees?

A. Since 1937, I believe.

Q. Approximately what is the size of the student body?

A. Total student body is about 3800 this last semester.

[fol. 224] Q. What is the approximate size of the faculty?

A. I believe around 300, I would guess.

Q. Who is president of the college?

A. Dr. John Adams.

Q. Would you state what your education has been, Professor, degrees and years in which you took them?

A. In 1924 I had a Bachelor of Science degree, in 1929—

Q. Where was that?

A. That was from Rhode Island State; 1929 the Ph. D., Doctor of Philosophy from Columbia University.

Q. Upon receiving your doctorate, what did you do?

A. I was teaching at Columbia before I got my doctorate, and I continued teaching there.

Q. In what field did you take your doctorate?

A. Psychology.

Q. What was the subject of the thesis?

A. Detection of deception.

Q. Had you taught at Columbia?

A. I taught there altogether about eight or nine years, I would say.

Q. Did you do some other work at the same time you were teaching?

A. Yes, I did research work most of the time.

Q. In what field?

A. Some of it in physiology and nervous system, some in the correction of emotional disorders, and some of the research in the field of public opinion and mass buying behavior.

Q. Did there come a time when you became interested in, did work in the subject of ascertaining public knowledge or public opinion?

A. Yes.

Q. When was that?

A. I have been concerned with it continuously since 1938.

[fol. 225] Q. What have you done in that connection?

A. I have made a rather wide range of studies of public opinion, public response to various forms of influence. Do you want me to be specific?

Q. Yes, I would like you to tell the Court how you became interested in that field, what you have done in that field, and in what capacity.

A. In 1938 I went with the Psychological Corporation which is an organization which has a division called Market and Social Research Division; I became a member of that division. The function of this division is to make studies for business and industries which require the use of polling techniques, for the most part. I remained with the Psychological Corporation, I went with them in 1938 and remained with them until 1940, at which time I joined the staff of C. E. Hooper, Inc. which makes the radio polls, so-called Hooper rating polls; I remained with Hooper until 1943, when I set up my own office, and Mr. Hooper became my first client, and my function as a consultant was to work with industries, business research organizations, magazines, radio networks, so on, doing primarily polling studies in the cases of the industries doing morale studies among their employees, and so on. I closed my office in 1947 and went back with the Psychological Corporation again in the division—no, I went back in the so-called Biomechanics division, which is concerned with problems for industry, working with industrial employees in problems of morale training, so on, all involving sampling procedures. In 19—after one year, in 1938, '48, I went back with the Market & Social

Research division of the Psychological Corporation and re- [fol. 226] mained with them doing polling studies for a wide range of business and industries until the Fall of this year, at which time I came out to Hofstra and I remained as consultant to the Psychological Corporation.

Q. Have you written books on the subject of psychology?

A. Yes.

Q. Did you write a book with Mr. Hooper?

A. Yes.

Q. What was the name of the book?

A. The name of that was Radio Audience Measurement.

Q. What was the subject matter of the book, what the name suggests?

A. Subject matter was methods that are used in obtaining information about radio audiences, using polling techniques.

Q. Would you state to the Court please, some of the more notable polls and surveys involving poll taking that you have done, either yourself, or in conjunction with the Psychological Corporation? In asking my question I mean during the time of the twelve years you have been engaged in this type of work directly.

The Court: Let us add to that what part you played in the activity, whatever it was.

The Witness: In the—

The Court: Polls first, then activity.

The Witness: We made one I think of, a study of public attitudes toward the Dupont Company; that was done for the Dupont Company, and I was directly in charge of the work we might say, I suppose; I say client, I worked directly with the client and worked in designing the study and [fol. 227] writing and reporting it to the Board of Directors of Dupont, so on. I have also worked for General Electric on studies of the effectiveness of their employee communication, and also public attitudes toward General Electric techniques, some of the techniques which General Electric uses for the maintenance of an attempt to maintain high morale. In the studies of morale, morale studies, and in studies of the methods of reaching employees, I have been in charge of those, in the study of public attitudes towards General Electric, I have been just one of a group of the Psychological Corporation who were working on that, the

other being Dr. Freiberg and Dr. Henry Link. For the Eli Lilly Company I did a study of morale——

Q. What sort of a company is that?

A. That is a pharmaceutical, so-called ethical drug company located in Indianapolis, I was in charge of; morale study there was part of a larger study in which we also studied machines and policies and factors influencing employees.

By the Court:

Q. Were there some other activities?

A. Yes. Then did some studies for radio networks. One I recently did on a study of television in the New York area for the National Broadcasting Company, currently doing one for the study of the educational facilities in Nassau and Suffolk Counties for a citizens group here in Nassau and Suffolk. I have done rather a large number of studies on [fol. 228] methods, and developing accurate methods for obtaining information about the influence of radio programs; those were done while I was director of research for Hooper; subsequently when I was consultant to him. Among the duties is one pretty well known in the radio business, study of influence of psychological factors of memory on reports given on radio listening; been rather a large number.

The Court: Could I ask a question?

Mr. Grimes: Certainly.

By the Court:

Q. Suppose we help you out this way. How many more of those similar activities would you say you have been engaged in since 1938?

A. I would suppose probably between 50 and a hundred, probably.

Q. In each of those activities was that devoted to ascertaining the public mind about some question?

A. That is what I was speaking of in saying 50 to 100; yes, some of them were done in Canada as well as the United States.

Q. In ascertaining the public state of mind with respect

to these different given questions, that was ascertained in what way?

A. Through the use of sample taking, and personal interview with a sample of the population.

Q. Then you would get reports, would you?

A. That is right. The interviewers would be sent out.

Q. And in those activities, 50 to 100 of the kind you have mentioned, including the kind you have mentioned, could you tell us what has been the nature of your participation [fol. 229]?

A. My participation has usually been in the matter of designing and directing the study, and writing the reports and making a contact report to the client subsequently.

Q. I would think the important part of that would be interpreting the reports?

A. That is correct.

Q. Do you include that in your participation?

A. Yes.

Mr. Rollins: May I ask, what your Honor said about the public mind, did you mean public opinion?

The Court: Yes.

Mr. Rollins: I think there is quite a distinction between mind and opinion.

The Court: I think maybe I will put that in the question.

By the Court:

Q. Would your answer be the same when I said your object was to ascertain the public mind about a given question, if I said public opinion?

A. It would be the same.

The Court: I used mind synonymous with opinion.

By Mr. Grimes:

Q. Have your surveys, 50 to 100 also included the matter of public knowledge?

A. Yes, a good many have been public knowledge, some public attitudes, some public opinion.

[fol. 230] Q. When you say public attitudes, will you give the Court an illustration of what you mean by that?

The Court: Did he not give that when he said the General Electric Company retained him, the Dupont Company retained him to find out what the public thought of the Dupont Company?

Q. May I ask about one more? Did you do a study and survey of the attitudes toward public ownership on one occasion?

A. Yes, on more than one occasion.

Q. Would you state what job you did in Canada in that connection?

A. In Canada I was consultant to the Elliott Hames Research Organization, and developed for them surveys for measuring public attitudes toward large industries, and toward Government and Government ownership.

Q. For what company did you do that?

A. Elliott Hames had as a client on that the Canadian Industries, Limited, so-called, C. I. L. General Motors of Canada, General Motors, Ltd.; Imperial Oil and one other, I don't recall just at the moment.

Q. Were the Dupont Companies involved?

A. Dupont owns quite an amount of stock in Canadian Industries, Ltd.

Q. Precisely what was the subject of that survey?

A. First, to find out what the public's attitude toward ownership of various industries in Canada was, and what attitude toward these, group of large companies in Canada was, and the factors which might be influencing attitudes toward large companies.

[fol. 231] Q. You have told the Court you had developed some techniques yourself in connection with the measurement of public knowledge or attitude?

A. That is correct, yes.

Q. Will you state what some of those techniques are?

A. One of them was a technique for determining radio audience listening by using somewhat smaller numbers of people than had previously been used for getting information, what they were listening to at a given time and what they had listened to previously; this was called a combination of so-called coincidental and day part recording.

Q. Is that in the book which you wrote?

A. That is the book which I participated in, Radio Audience Measurement.

Q. Is there another contribution you have made to the science of sampling?

A. Yes, there is, a section in there on sampling and statistics of sampling.

Q. Have you made a special study of sampling?

A. I have studied that quite carefully. I do not quite get what you mean by a special study.

The Court: That is the answer. Counsel wants to know if you are familiar with it.

Q. Without going into detail, have you written extensively on sampling?

A. I have written material in a book on sampling and one or two articles perhaps on sampling.

Q. Have you written rather extensively on the subject of surveys in general?

A. Yes.

Q. About how many articles have you written, and for what periodicals?

A. I suppose I have written about a dozen; they have [fol. 232] usually appeared in trade journals, in the radio field and in public opinion quarterly, and in a book.

Q. In the psychological field how many articles have you published, approximately?

A. I would say approximately 40, 50.

Q. What course do you teach in Hofstra?

A. One called business industrial psychology, which includes in it as part of the contents, problems of sampling survey methods, so on, also applied psychology, where we teach those, rather more applied than business industrial; applied was second, and general.

Q. Have you lectured before societies?

A. Yes.

Q. Will you name the societies?

A. American Association for the Advancement of Science; American Psychological Association, the Eastern Division of the American Psychological Association, New York Psychological Association.

Q. Will you state briefly to the Court the development of

public opinion, public knowledge and public attitude polls? By that I mean, in the various categories, starting with the first, going to the second and then to what I understand to be the present stage involving the one which you have used.

The Court: I think that question ought to be free from very general.

The Witness: There are, I would think, perhaps three stages that you could have in the development of these and one of them, if I understand, you want the historical development?

A. Yes.

The Court: We really do not want a history. If there are [fol. 233] three stages in its development and you can state them briefly, we will take that.

The Witness: First, there was a period in which polls were taken where you went out and got a few people here and there, and perhaps the most outstanding example of this rather crude type of sampling was represented by the Literary Digest, in which for their sampling they took people whose names were in the telephone directory; perhaps as a result of the big error that occurred from using that technique the second stage of development occurred, which was what we speak of as quota sampling; it is a much more reliable technique than cruder methods, and you attempt to distribute your sample in accordance with what you know of the population, in accordance with what you may have on the population, and where you do not have exact data you may try to develop some sort of criteria as for example in economic status; we have no exact data on economic status but in quota sampling, one still attempts to distribute its sampling over a wide range of economic groups, so actually we speak of the highest percent of A group, next, 20, next 30—I should say the next 30 is called B group, the next, 40 C group, the lowest 20 percent D group and in using this type of sampling, you direct the interviewers to get so many in A and B group, so on, but those economic data, economic classifications are not very [fol. 234] well, they are a little bit loose, because they depend on intuition to a large extent. We think evidence has been accumulated over a long period of time shows

actually using this type of sampling you tend not to get the lowest economic strata.

By the Court:

Q. That is called quota?

A. That is called quota. The third type of sampling, a type which is generally recognized as being the very best scientific development at the present time, goes by the name of a probability type of sampling, and in the probability type sample nobody uses any judgment in the selection of people who are to be interviewed, that is all done by mathematical procedures, with the result you have a strictly random selection, and when the sample is properly designed, every member of the population has exactly the same chance of becoming part of the sampling as every other member of the population.

Q. Is that as you see it, one that makes that poll better than the first and second types which you described?

A. Obviously. What we try to do in sampling is make that sample represent the population from which it is drawn, and when we take out all human judgment and use random selections we get the best representation that we can get.

Q. Is that type of sampling in your opinion the best type?

A. That is the best type.

Q. Have you recently worked on a poll done by Hofstra College for the Nassau Clearing House Association?

A. Yes.

[fol. 235] Q. Would you state what the character of that poll is?

A. (No answer.)

Q. May I say this, you understand, do you not, that the expenses of that poll have been paid by the defendant in this case, is that correct?

A. To the best of my knowledge, that is correct.

Q. The poll has been done at the request of the Clearing House Association?

A. That is correct.

Q. Your college was asked to do this poll, and you have completed the poll, is that correct?

A. The president of the college was asked to do the study, yes.

Q. The study has been done by the college?

A. That is correct.

Q. Have you been in charge of that study?

A. Yes.

Q. Could you state to the Court what that study has consisted of?

A. It was a study designed to determine for the population 21 years of age or over in Nassau County how much information they had, or how much knowledge they had of the meaning of the four terms which have been discussed here in court, terms used in banking, savings account, compound interest account, thrift account and special interest account. We also undertook to find out where people, what knowledge people had of where these accounts were available, if they knew anything about them, and finally what account they preferred to open when they had money they wanted to put out at interest, and in what type of bank they preferred to open an interest bearing account. That was roughly the purpose of it.

[fol. 236] The Court: You want him to go right through?

Mr. Grimes: *It* think it will take probably an hour, because I will ask him various steps he took and how they did this; and because of the type he says as probability samples they used, involving mathematics, I do think that would take three-quarters of an hour or an hour to an hour—

The Court: I do not think we could stay that long because then we would have to have cross examination. Convenient for you to recess at this time?

Mr. Grimes: I think this would be a good time.

(Adjourned to January 29, 1951 at 10:00 A. M.)

Mineola, New York, January 29, 1951.

Trial Continued

MATTHEW CHAPPELL, recalled as a witness having been previously duly sworn, testified further as follows:

Mr. Grimes: We submit to the Court a memorandum on the admissibility of the Hofstra survey, which is the subject of the Professor's testimony. I have given a copy to the Attorney General.

[fol. 237] Mr. Rollins: I have not had a chance to prepare any memorandum, but to me—

The Court: I will give you the fullest opportunity. I am going to receive it in evidence and I will give you each a motion to strike out, and on which I will reserve decision.

Mr. Rollins: The subject concerning which this witness is to testify, is not a subject of expert testimony.

The Court: If you object, I am going to overrule the objection on all grounds, then I say, because I am in great doubt myself about it, move to strike it out at the end and I will reserve decision, then I will be able to read Mr. Grimes' memorandum. I will read anything you submit, but let us get the evidence and get the witness out of the way.

Mr. Grimes: Since we have a number of documents I would like to have Mr. Brumback, who is assistant to Professor Chappell, and on the the staff of Hofstra College present at the counsel table if I could. It will assist me with any document, and it may facilitate. Will that be permissible?

The Court: That is granted. Have him at the counsel table, wherever you want him.

Mr. Grimes: I would like to ask several questions, on one more item relating to qualifications, if I might.

The Court: Yes.

[fol. 238] Direct examination.

By Mr. Grimes (Continuing):

Q. Professor, will you please state briefly what the American Board of Examiners in Industrial Psychology is?

A. The term is Professional psychology, American Board of Examiners in Professional Psychology.

Q. Yes.

A. This is a board which has been set up by the American Psychological Association to pass on the qualifications of psychologists working in the psychological professional fields, one of these being the field of business and industrial psychology, and if they pass favorably upon one's qualifications he then becomes known as a Diplomate in the field in which he is qualified.

Q. Are you a Diplomate of that board?

A. Yes, I am.

Q. When did you receive this honor?

A. About two years ago, almost immediately after the board was set up.

Q. In what fields are you a Diplomate?

A. Business and industrial psychology.

Q. Coming down to the present survey, would you state what the survey was designed to determine? I believe you stated in part, but even though some repetition might be involved, will you state that in full?

A. Yes. May I use notes to refresh myself?

The Court: Yes. If you cannot remember without notes use notes to refresh your recollection.

The Witness: There were four things the study was designed to determine.

The Court: This is this particular?

[fol. 239] Mr. Grimes: Yes.

The Witness: The first was what the meaning of the four terms used in banking is to people 21 years of age or over in Nassau.

Q. What are those terms?

A. Terms are savings account, compound interest account, special interest account and thrift account.

Q. Will you state please, the reason for the selection of Nassau County?

Mr. Rollins: I object to the question on the ground—

The Court: I will sustain the objection to that.

Q. The survey was confined to Nassau County is that correct?

A. Yes.

Q. Will you please proceed to state what the study was designed to determine?

A. The second factor was to determine people's knowledge as to financial institutions in which each of these four accounts is available. The third purpose was to determine the kind of account that is preferred when such people wish to open an interest earning account, and the fourth was the type of bank in which they preferred to open the preferred account.

Q. Bank? Did not the question also include financial institution?

A. Financial institution, I should say.

Q. I believe you testified on the general subject before, but I wish you would elaborate to some extent at this point upon the types of surveys that have existed, that is [fol. 240] to say, three surveys since surveys came into being, at least in modern times.

A. Well, the first as I remarked on Thursday is the period in which we used very crude types of samples, where there was no attempt to represent the population about which one wished to speak; rather one went out and took interviews with a few people who may or may not represent the population, and then made interpretations as to the total population.

Q. You designate that as crude?

A. Called that as crude, and perhaps representing the best known sample of the studies in which that type of sample was used was the Literary Digest study.

Q. What did they do in that?

Mr. Rollins: If this witness knows. That would be hearsay.

Q. If you do not know, do not answer.

The Court: Do you object?

Mr. Rollins: Yes.

The Court: Sustained.

Q. Do you know what was done in connection with the Literary Digest poll from your knowledge, experience, reading, study or in any other fashion by which a man gains knowledge? I ask you that as an expert witness.

Mr. Rollins: I object.

The Court: I will sustain the objections. I think it is just too far afield. We are down now to this particular study,

and he says he gave us the classification under which it was [fol. 241] prosecuted and he also gave us that very opinion you are now seeking, before, but not so much in detail. When he gave various divisions of this sampling he gave us the example of the Literary Digest poll. It was not objected to then. I think we ought to move along on this.

Q. On this particular poll, Professor, would you state what you did right from the beginning, and explain to the Court the reasons why you did one thing as distinguished from another, bearing in mind the distinctions that exist between the various types of polls and the various methods employed?

The Court: I think that question ought to be broadened. I think Mr. Rollins will agree with it, although he does not agree with the admission of the evidence. This gentleman supervised the whole thing, and instead of just confining his answer to what he did, let him give an exposition now, if it fits into your train of thought, what was done by everybody.

Mr. Grimes: I meant to say what was done by everyone.

The Court: Let us have it that way.

The Witness: In answering this I would like to take, divide it into two divisions, one method we used for gaining the opinion and the other people from whom we got it; in other words, what did we ask and whom did we ask. The first method as to what did we ask, this was, the study was [fol. 242] made with personal interviews by trained interviewers; the interviews were obtained in the homes, and they were obtained only with persons who were designated mathematically to be interviewed. I have here some examples of questionnaires which I would like to show, if I may. Since we were dealing with four terms—

Mr. Grimes: I would like at this point to introduce the questionnaire in evidence, that is form of questionnaire only.

The Witness: That is the form of the questionnaire only.

By the Court:

Q. They were prepared under your supervision?

A. They were prepared under my supervision.

Mr. Rollins: I object to the offer in evidence upon the ground it is incompetent, irrelevant and immaterial, and violates the hearsay rule.

The Court: I would rather you would not make that motion, because that motion, according to your view of this evidence should have application to every question, and I excused you from making that objection on this type of evidence before, so I will make the ruling that we will consider you have made a motion, you have made an objection to every question put to this witness on the ground that the testimony is hearsay.

Mr. Rollins: Not only to those questions he has already [fol. 243] been asked, but all questions right down to the conclusion of his testimony.

The Court: And on each one I shall overrule the objection and grant you an exception, and on each one I will say to you make a motion at the conclusion to strike out and then I will reserve decision on that one.

Mr. Rollins: Thank you.

The Court: Now, then, we will mark the exhibit.

The Witness: D-G. There is only one thing that differentiates each one of the forms, and that is we have in the first question rotated the order in which items 2, 3, 4 and 5 appear. The first item is always checking account; we used that as an introductory question, but we had to rotate 2, 3, 4 and 5 so that we would not introduce any error or bias due to serial position.

The Court: You got as far as saying those questionnaires D-G were prepared by you. Will you go on from there.

The Witness: The reason for preparing four forms was that we were dealing with four terms used in banking, and about which we wished to ask the respondents. In order to avoid any error or bias which might come from having one of these elements always being first, one always being second, one third and one fourth, we rotated the position so that for example—

By the Court:

Q. You rotated those terms in order.

A. That is right.

[fol. 244] Q. We can see that from the form? I noticed it.

A. That is the only difference between the four forms of questionnaire. In all cases the second question was, will you please state what kind or kinds of financial institutions offer each of these services, and by financial institution we mean banks of all types and savings and loan associations. Services were then indicated on the questionnaire. The third question, when you deposit money to earn interest, which of these accounts do you prefer to open, and the final question, 3-A asked of those who had expressed a preference for one or another type, in which type financial institution do you prefer to open such an account.

Q. Does that complete your answer?

A. That completes the questionnaire.

Q. You have said these were interviews with persons at home, with persons you designated mathematically. Will you explain the reason for mathematical designation.

By the Court:

Q. What do you mean by that word?

A. I mean that in every step of the development of this sampling we used numbers, random numbers to determine which city, which part of the city, which dwelling, which person is going to be selected to be interviewed. We have designed this so that every person in the County who is twenty-one years of age and over has an equal probability of being selected in this sample.

Q. When you say probability, you mean a mathematical chance?

A. A mathematical chance, each person having an equal [fol. 245] mathematical chance of being selected as a member of the sample.

Q. Will you explain to the Court what you mean by a sample? I realize that raises a very large question; it will be the subject of your testimony, but there is one aspect of a sample, is there not, namely, the number of persons interviewed?

A. That is right, the number of persons whom we interview, from whom we took interviews was 928.

Q. By sample you mean the number of persons interviewed in relation to the entire population?

A. That is correct.

Q. Will you explain, please, the merit or lack of merit, or what your opinion is, on the subject of mathematical selection as distinguished from the type of selection used in other polls?

The Court: He has already answered that earlier. He said that that was the third classification, and an improvement over—that is the time he spoke about the Literary Digest, just taking names out of a telephone book. This method, he has the more fluent language to describe it, but it seems to me it charges certain elements of the County generally; they have a possibility of being interviewed, and then his mathematical arrangement selects from the community various groups, and the people in those groups, and I think that is how he said he arrived at it. Is that about right?

Mr. Rollins: The other four were taken out of the telephone book. He has not said how he got these.

[fol. 246] The Court: He is coming to it.

Mr. Grimes: May we have the witness's answer to the Judge's question? We have interruptions. I would like really his answer to your question about that.

The Witness: Yes.

By the Court:

Q. Is that about what it is? Don't mind correcting me, because this is the first I ever heard this.

A. What I would like to show is, exactly what we did do.

By Mr. Grimes:

Q. The Judge asked you a question.

A. And I answered it, yes.

The Court: Do you know where you left off? We are going to hold you to your train of thought.

The Witness: We had complete discussion of the method. I would like now to start in discussing with whom did we select the sample. When one wants to obtain knowledge from a population there are two ways that you can do it. First, you can go to everyone of the population, which is a census, but to take a census is a very, very expensive operation, and even the Government does not afford it,

often so in science and in working on a public opinion market we have developed a concept of sample to try to represent its population by a smaller number of people who can [fol. 247] be managed by a manageable size. When we use a census there is never any question, but what the answer you get is one and only, it is a definite one, definite, absolute thing. When you use populations, when you use samples of populations you may come out with a figure which is exactly the same as you would get from the census, but you may come out with a small variation from that census figure. If a sample is properly designed, you know exactly what the limits are within which a variation from the census can occur. There is only one type of sample in which you can compute these possible limits of variability, and that is with the probability type of sample which I wish to speak of here. That is one of two major differences.

By the Court:

Q. Is that the sample that was employed in this study?

A. That is right, one of two major differences between this type of sampling and earlier samples which we speak of as quota is, that there are no mathematics applied to the quota sampling which enable you to calculate what the error might be; I don't mean to say quota sampling might not be very accurate for certain purposes, but we claim one never knows exactly how accurate it is because there is no way of measuring the accuracy. In the case of a probability sample you can measure it with accuracy very definitely.

Q. You spoke of one of the differences. Is there another [fol. 248] major difference between probability and quota type of sampling?

A. Yes, there is the other, which may become apparent later here is the fact that in a quota sample somebody has to exercise judgment in determining what cities, for example, might be used, city, town, village, what part of the city somebody decides he will use this or that part of the city and he decides, then sends an interviewer out, and the interviewer decides what house he will go to, and when he gets to the house he will usually decide he will take whoever comes to the door if he can, and that creates a bias based on availability of the people who are most readily available.

You also get a sample which is strongly biased in the direction of small homes. If you take somebody in every home then the person who lives in a small home has a greater probability of being selected than a person in a large home. I will make that a little clearer.

The Court: That is very clear, that whole statement is clear. It goes back as you said to the judgment of the man who selects what city to take. If he is wrong on that the poll is wrong.

The Witness: That is right, it is a judgment sample, it may be accurate, but we don't know how accurate.

Mr. Rollins: I object, of course. The sample is to represent every part of the population.

By the Court:

Q. You say sample. You mean sample in this study?

A. That is right.

[fol. 249] Q. If I ask you that?

A. I wanted to represent every part of the population. We want to do it without introducing any judgment on the part of any person. The sample which will reflect the total population most accurately will be a sample in which every person in the population has the same chance of being selected in the sample, and in the design of our sample that is what we have undertaken to preserve, that is every individual in the population shall have the same probability of being selected.

I would like, if I might, Judge, to quote from a bulletin put out by some men in the Department of Census on this thing we have been talking about, judgment: it is just a very short quotation; this is done by Hanson & Horowitz; the publication is a publication of the United States Department of Commerce and the Bureau of Census; it is called a new sampling of population, sampling principles introduced in the Bureau's monthly report on labor affairs.

By the Court:

Q. You are familiar with that publication?

A. Yes, and I know the men who have published this.

Q. Is it recognized as an authority?

A. It is.

Q. It is an official document?

A. It is, the statement is this: "Personal judgment if exercised in determining the particular units to be included in the sample indices—involves the risk of serious bias, and also makes it impossible to use existing samplings that are to determine what the sample error is likely to be." I use that to verify the statement there are no mathematics available for quota type sampling. You have, when you [fol. 250] are attempting to give everybody an equal opportunity to be included in the sample, you are using what we speak of as random selection, and we mean that random selection sort of thing you would obtain if for example we were, suppose we were to put the names of all of the people in the County in a bowl with a slip of paper and we mix that bowl up and drew off one name at a time much as they do in the draft. Sometimes this would be a random selection. Another type of random selection that is used more frequently nowadays is to deal with units with which you are concerned and give them a number; if we had a hundred persons that we wanted to select from we would give each one of these persons a number, then we would go to what is called a table of random numbers.

The Court: Let me interrupt you. Would it not be better if the testimony was what they did now. This is what you did.

The Witness: Yes.

The Court: Suppose we put it in the past tense.

Mr. Grimes: I think so, except that I think it is impossible to distinguish the theory and practice and I asked him if he is prepared to make full explanation.

The Court: He said as soon as you did these things. Suppose you put them in the past tense with respect to these questions on from there but keep in mind Mr. Grimes' idea to give an exposition on each subject before you go into it.

Mr. Grimes: I ask the Court to allow him liberality in explaining.

[fol. 251] The Court: Yes.

Mr. Grimes: So our record may be complete. I think that will satisfy the purpose very well, and that is the purpose of the examination. I am offering this testimony merely by

way of explaining in advance as to what they did, so when he testified what they did it would be more understandable.

The Court: Proceed in the way you are.

The Witness: Tables of random numbers have been designed so that we can get a greater degree and more exact randomness than is possible than even drawing from a bowl. Studies that have been done drawing from a bowl show, that even here you may get some pattern, you do not know why, but you do get them to random. You might get the same pattern and perhaps random numbers. The tables are to assure that we do not get any kind of pattern in our selection. The best known of the table of random numbers is one by Tibbett, done in England. We did use these tables. We also used a table from Snedecor here. Snedecor is a standard text in statistics. The use of these tables does produce more exact random selections than can be obtained in any other way. In the design of our sample, and in the design of any sample it depends on how you design it, depends on what data you have available.

Q. Will you tell the Court what the first data you have used was?

A. There are two types of data we use. One is information obtained from the Bureau of Census on the distribution [fol. 252] of population in Nassau County. This is the census release, 1950 census of population of preliminary count.

By the Court:

Q. United States official census?

A. That is the official census, and there are some very, very minor adjustments that may be made in the official count.

Mr. Rollins: If it is an official report the Court has power to accept it.

Mr. Grimes: I think it might be appropriate to offer this in evidence.

Mr. Rollins: This is subject to the same objection.

The Court: Mark it.

Mr. Rollins: The Court can take judicial notice as to the number of people in this County.

The Court: Mark it in evidence.

(Paper received in evidence and marked Defendant's Exhibit H.)

The Witness: These are all of the data that are available and the—

Mr. Grimes: There are some markings which are not part of our offer. The phrase "Psychological Workshop."

The Witness: The data which are available show this: The population in the County as a whole, the population in each of the three Townships in Nassau County, Hempstead Town, North Hempstead and Oyster Bay. They show for each of the Townships the population in each of the [fol. 253] incorporated areas of a thousand or over; to find out what the population is in the unincorporated areas, you have to subtract the total for the incorporated part of the township from the total of the township. It happens in Nassau County 54 percent. of the population lives in areas which are unincorporated. There are no statistics for that part of the population. We can—with the parts which deal with incorporated areas, we can lay out our sample in accordance with these steps; first, we can divide our sample so we locate the proper proportion in each of the townships, and that proportion is, Hempstead would get 67 percent, North Hempstead, 22, Oyster Bay, 11; that is on the basis of population. We speak of these using the data from the census to apportion our sample; we speak of that as stratification. We stratify not only in terms of townships, but also we will make a breakdown in terms of incorporated and unincorporated, and we speak of those as sections from the stratification, so 54 percent. of our sample is going to be drawn from the unincorporated areas, and 46 percent. from the incorporated areas.

Q. Did you stratify the population in connection with the construction of the sample?

A. Yes.

Q. You had reasons for doing so, did you?

A. Yes.

Q. Explain to the Court what those reasons were, please.

A. By stratifying the sample we increase its accuracy, or we decrease the limits within which the results can vary, but [fol. 254] the essential purpose is to use data that are avail-

able, modern data to increase the accuracy over what you would get with pure random in an unrestricted random sample.

Q. Will you explain why you made the breakdown, if that is what you did, in Oyster Bay and North Hempstead?

A. Yes.

The Court: Maybe we better recess.

Recess to 2 P. M.

Afternoon Session

MATTHEW CHAPPELL, resumed the stand and testified further as follows:

The Witness: The reason for making the breakdown between townships is there might be some difference between people in various towns, but if we allot the same percentage of sample it corresponds to the percentage of the population in each township we will represent what differences there may be exactly.

The Court: That, I think, answers your question?

Mr. Grimes: That does, yes.

The Court: Why he made the breakdown.

By Mr. Grimes:

Q. If there was another kind will you please tell the Court about it, the stratification and in connection therewith each item thereof?

[fol. 255] The Court: Keep that question in mind. I do not know whether you have not mentioned anything about two cities in the County.

The Witness: I had not quite got to that yet.

By the Court:

Q. I know that was not in the question, but the question was about towns. You have it in mind. What is your next question?

Mr. Grimes: My next question was to ask him to continue with stratification, together with the reasons therefor.

The Court: We will go back to his broad question and proceed with the exposition of what was done with respect to this, amplifying as you go along.

The Witness: I mentioned we had used the census data as one bit, or as part of the data for distributing the sample. However, that applies primarily only to incorporated areas, we have no data from the census which will help us distribute our sample in unincorporated areas, so it is necessary for us to find some other source of data which we can use to develop our sample for these areas. We found that there was an aerial photograph of the whole of Nassau County which was made in April, 1950, and we used this aerial photograph to supplement the census data in developing our sample. If I might, I would like to show the Court a [fol. 256] sample of that aerial photograph. This sample here is an aerial photograph of Glen Cove, and it is taken—the photographs are on a scale of about five inches to a mile, which enables us to count the structures on the map. Our purpose then is to develop a sample of structures for this area where we do not have any population data. If you care to, you might just use the glass and you can see the structures a little more readily.

The Court: I can see them.

The Witness: This was an incorporated area; we have also here an unincorporated area which we have called area N, which I will explain a little later, and actually this is Levittown, and you can see dwellings in Levittown readily. These are the data we used to develop our sample in the unincorporated areas and also as I will show a little later, we used them to develop the size of the sample in incorporated places for which we have no block statistics. There are in Nassau no towns or cities that are sufficiently large so that the census will provide block statistics—that is, the number of dwelling units in a given block.

The Court: Just hold that for a moment. We better mark those the witness has spoken about.

Mr. Grimes: I would also like to offer them in evidence after I have asked a few more questions.

The Court: I will receive them in evidence now with the same reservation of rulings.

[fol. 257] Mr. Rollins: Note my objection as heretofore.

The Court: Always.

Mr. Rollins: Incompetent, irrelevant and immaterial to the proceedings.

The Court: Let us have those marked because I say the witness referred to them just now so that it will be in the logical order in the record.

(The aerial photographs received in evidence and marked Defendant's Exhibits I and J.)

Mr. Grimes: May we designate Exhibit I as aerial photograph of Glen Cove City and Exhibit J as aerial photograph of what we designate as area N, being the Levittown area?

The Court: All right.

The Witness: These are the two sources of data we used in developing our sample. I would like to read the specifications of the sample as we designed this. I think it might be getting things along a little faster. The first population to be sampled was defined as of persons twenty-one years of age or older, residing in Nassau County; secondly, a sample of the aerial phototype was used which made it possible to designate in advance those households where the interviewers would call for an interview. This insured that interviewer bias would not affect the selection of persons to be interviewed.

[fol. 258] Q. There is a term I would like defined if I might, the term bias.

The Court: That is what I want to hear. I think I know what you mean, but you better put it on the record. What do you mean by the word, bias?

The Witness: We mean by the word, bias, that our sample, if the sample is biased, there is some way in which it fails to represent the population it is supposed to represent, and that is what we mean by bias; failure to get perfect representation would be bias.

Q. In other words, bias is a deviation from the true representation of the entire population, is that correct?

A. Yes.

By the Court:

Q. That goes back to your original principle that you remove as much as possible judgment of an individual from the method to be followed?

A. That is true. The third aspect of the plan required that all adult persons residing in the County be given an equal chance of being drawn into the sampling. This insured that the sample would be representative of the entire County. Fourth, the sample size was set at approximately 1000 as being sufficiently large to provide reliable data. Fifth, for administrative reasons, it was decided that the sample would be drawn from 60 clusters or small interviewing areas distributed over the County. These areas were to be well defined, so that the interviewer would know exactly where to work. The clusters were bounded by streets, roads, railroad, or other natural land marks. If I might have a cluster map I would like to show the Court what we meant by the selection of clusters here and there, and their distribution. This is actually the end result which I would like to show to you.

Mr. Grimes: I ask that map be marked for identification.

The Court: I think, Mr. Grimes, if he uses it I will mark it in evidence.

Mr. Grimes: Very well. I am going to offer it.

The Court: So let him talk on a little bit further as to uses. We will put it in evidence.

The Witness: This is the way the clusters actually did fall. I will explain how they were selected later. You can see that the large number fell in dense population areas; in here in the areas where there is little population—

By the Court:

Q. You are referring to red circles with a number in the center?

A. That is right. These are so-called cluster numbers, and this is approximately where they fell.

Q. The circle is approximately the area?

A. That is right, yes. The circle does not define the area, but the area is where the circle is somewhere, and I will

show you exactly a sample of the exact map, of blocks that were involved.

[fol. 260] Q. The circle is to identify the area on this map so that you could see it quickly?

A. That is right.

The Court: Suppose you stop there. Let us mark this map in evidence.

Mr. Rollins: The plaintiff objects to the introduction of the map offered on the ground it is incompetent, irrelevant and immaterial.

The Court: I will overrule the objection and receive it in evidence.

Mr. Grimes: At this point I would like to ask just a few questions in regard to Exhibits I and J, for the purpose of offering those for identification.

The Court: Go right ahead, keeping in mind your over all question of where you stopped on the question of locating the clusters. Now Mr. Grimes wants to interrupt.

By Mr. Grimes:

Q. I understood you to say that you used an aerial photograph of the entire County; is that correct?

A. Yes.

Q. Is Exhibit I for identification a portion of that aerial photograph?

A. Yes.

Q. Also Exhibit J for identification?

A. Yes.

Mr. Grimes: I would like to state to the Court now—excuse me.

Q. Did you in the course of preparation of the sample and the production of this survey use the entire aerial [fol. 261] photograph of Nassau County?

A. Yes.

Mr. Grimes: I would like to say that we have the entire aerial photograph in Court, and I would like to have it produced for inspection, if anyone cares to inspect it. We have produced it here and it is available for inspection. We will put it right on the table. I now offer in evidence our

Exhibits I and J for identification. I offer them in evidence.

The Court: I thought they were in evidence.

Mr. Grimes: No, marked for identification.

Mr. Rollins: I object to them.

The Court: We will receive them in evidence now, and your objection will be noted.

(Papers received in evidence and marked Defendant's Exhibit K.)

By Mr. Grimes:

Q. Will you proceed, please?

A. I wonder if we might now have the stratification map showing areas I would like to—I have it right here. We, having census data and the aerial photograph, we were in a position then to lay out our total sample, and the first step as I pointed out was to divide this into first, the three townships, and then to divide the towns in incorporated and unincorporated areas within each township. On this map we have the areas. We show the unincorporated areas and the towns. The unincorporated areas are those that are marked with a letter. In the area that is marked with [fol. 262] the letter—that is, in the unincorporated area, and we speak of these areas, we can call them areas, pseudo-towns or anything we choose, they are distributed throughout the three townships. We made the stratification then——

Q. Excuse me just a minute, Professor, how did you designate this map? I don't mean by letter, please.

A. There is a title right on top there.

Mr. Grimes: I offer in evidence what purports to be street and road map of Nassau, bears the designation on top, map showing incorporated and unincorporated areas as defendant's exhibit L.

The Court: That being the map which the witness just used in the course of giving his testimony. It will be received in evidence.

Mr. Rollins: I object on the ground it is incompetent, irrelevant and immaterial.

The Court: The same ruling. In your objection you are including the word incompetent, and it gives me a little

trouble, and it does not serve any purpose from your point of view. You are not objecting because of its being inaccurate?

Mr. Rollins: I am not questioning the accuracy of these maps, or whether the fact they were taken, but I do not see it has any bearing on mind or imagination, brought in for local color to build up. This is an insult to my intelligence, no matter what source it comes from.

[fol. 263] The Court: The element of the competency of the map being removed, and that applies to all of the maps, as he generously said, I will receive them in evidence. His objection to materiality and relevancy will stand.

Mr. Rollins: So there will be no question about the grounds of my objection, aside from the fact they are incompetent, irrelevant and immaterial.

The Court: State it at the end and you will have produced all the grounds you can possibly consider, if you state them now, but I ran into the question of the competency of the map, so I am thankful to you for not presenting the competency. Go ahead, mark it.

(Paper received in evidence and marked Defendant's Exhibit L.)

The Court: Were you interrogating the witness, or did you want him to resume?

Mr. Grimes: I think he can resume.

The Witness: At 46 percent the sample was allocated to incorporated areas, and 54 percent to those unincorporated areas that are indicated there by the letters. I had previously mentioned what the percentages were for the townships. The next division was division by size of the place, starting from the city, the town, villages.

Q. Is that what you call the array?

A. This is the array of towns.

[fol. 264] Q. What is the first array you made, one of towns?

A. Incorporated places.

Q. We are now starting with what they call incorporated places?

A. Yes.

Q. That is 46 percent of the County by population, is that right?

A. Yes. I wonder if I may have my bag up here. What we wanted to do was to be sure we represented every place of different sizes with its proper weight. To that end we drew up what we call an array of towns, starting with Hempstead, which is the largest, and when I say town, I mean towns, cities, small places.

The Court: Small letter T.

The Witness: That is right.

Mr. Grimes: They are using census data, which differs from our legal classifications.

The Witness: So we put these in an array, and we know we are getting every one of these places which are incorporated, and have a population of 1,000 and over; we know there are 27 clusters to be selected from that group.

Q. Why 27?

A. Because that is the proportion of population which falls in this incorporated place over 1,000.

Q. That is 46 percent or 60?

A. This is a little less than that because part of the population also resides in incorporated places of less than 1,000. There are about 13,000 total population in the County which is made up of places of less than 1,000 which are incorporated. The total population in these areas in this incorporated part of more than 1,000, is 296,423, and [fol. 265] since we are to draw 27 clusters that means we can do that by dividing the 296,423 by 27.

Q. By the way, at this point I do not think you have given the total population of Nassau County under the 1950 census.

A. Total population is 666,000 and two hundred something as I recall, I don't remember the exact figure.

Q. The figure you have just given, 296,423, would bear the same ratio to that as your 27 clusters bears to 60 clusters?

A. That is right. We speak of this division by number of clusters as a sampling interval, and we use the sampling interval in this way, and here I have to go back to our random numbers. We have first our array of cities, from

the largest to the smallest, and every time there is an interval of 10,979, we are going to locate one interviewing place, wherever that 10,979th person resides. In the case of Hempstead, for example, we have 29,000 or more people, so there must be at least two sampling intervals in Hempstead. In other words, we must take at least two clusters in Hempstead, possibly three, depending on our random selection. The use of random numbers comes in at this point. Suppose that we have this situation, as we had, we took two clusters from Hempstead, and that accounted for about 22,000 in population. We have then some seven thousand of population left over from Hempstead which will enter into the later group influencing determination of the next cluster. Where that cluster will fall we determine in this way. We go to the table of random numbers here, at any designated place, perhaps it would be the last [fol. 266] number from which we took a number, we start there and we take the first number we come to, which is between zero and 10,979, first number we come to which is between those two, and let us say we are using five columns, of random numbers table, that will be the number at which we will select our third cluster.

Q. Have you told about the array which is a necessary concept in the application of random numbers?

A. I have mentioned we did array these towns from the largest to the smallest.

The Court: I think, if you will, instead of using towns there, I think your record will be clearer if you could use the word, communities.

The Witness: Communities or places.

The Court: Because we have the word, towns, meaning a specific area out here. Community or place, whichever you prefer. Where you mean town, say town, but where you do not mean town, perhaps you could say community or place, whichever suits your vocabulary.

By Mr. Grimes:

Q. These are incorporated communities, of 1000 or over that you are applying this process to, is that correct?

A. That is correct.

Q. Is it not a fact that you start in these incorporated

communities in excess of 1,000 persons, say from top to bottom, that is Hempstead with its 29 and some thousand and the next largest and the next largest down to those [fol. 267] which are just barely above 1,000 and then apply the selection of a particular community by application of random numbers, is that right?

A. By application of the sample interval together with random numbers.

The Court: There is one other thing. The witness was pointing to some pages in the book there when he spoke about random numbers, and he said as you find here. We do not have the book in evidence, or that page if it is important.

By Mr. Grimes:

Q. You have some pages of random numbers there?

A. You can put these in evidence.

Mr. Grimes: I want to offer these in evidence.

The Court: Link it up with this last answer.

Q. In applying random numbers to the area, from the largest community to the smallest community in the incorporated division of your work, I show you some documents and ask you whether these are typical of the random numbers you used to make the selection on the array?

A. Yes.

Mr. Grimes: I offer that in evidence.

Mr. Rollins: Objected to, incompetent, irrelevant and immaterial.

The Court: I will receive them in evidence.

[fol. 268] Mr. Rollins: He made himself or is it something statistical?

The Court: He used them.

Q. Whose are they?

A. They are from Tibbett's.

The Court: Up to now, it does not matter. He used them.

By the Court:

Q. This is the group of random numbers you used when you made the determination that you had stopped at the number which you found between zero and 10,979?

A. Yes.

By Mr. Grimes:

Q. Where did Exhibit M come from?

A. It was torn out of a book similar to this of random sampling numbers by Tibbett.

Q. Could you state briefly who Tibbett is?

A. Tibbett is an English mathematical statistician.

Q. Does that book which you have in your hand contain a series of random numbers?

A. Yes.

Q. They are identical?

A. They are identical.

Q. With table five, six, table 17 and table 18 of random sampling numbers which comprise Defendant's Exhibit M, is that correct?

A. Yes.

Mr. Grimes: I ask that book be marked for identification for comparison purposes, but I do not intend at the moment to put it in evidence.

[fol. 269] The Court: Mark it for identification. I really do not see the necessity of it at the present time, but comply with your request.

Q. Is Tibbett a standard treatise used by mathematicians who have problems such as yours?

A. Yes.

Q. It is a widely known authority?

A. Yes.

(Book marked Defendant's Exhibit N for identification.)

Mr. Grimes: May the record show I have made the book available to the Attorney General for comparison, if he cares to do so.

By the Court:

Q. Just one question about these random sampling numbers. Are they compiled in just the way the name implies, taken at random?

A. It is the most perfect random group of numbers that we know of.

Q. Would you give us a definition? For instance, what random numbers, the way you have been using it in your testimony here recently, what is the definition of that expression?

A. I would say a table of random numbers is a table in which no matter what systematic means you use for analysis you cannot come out with biased results, the same number of zeros, the same number of 1s, 2s, so on will show you, no matter what systematic order you use for select- [fol. 270] ing them. There will be no pattern of what we call bias.

Q. So that this table of random sampling numbers is really studiously and carefully set up to accomplish that purpose which you have just stated?

A. Exceedingly so.

By Mr. Grimes:

Q. You know how those random numbers were compiled. Will you state briefly the mathematical process by description?

A. They were compiled by using census data obtained in England in which it is my understanding they used the 17th place of logarithms, of numbers and it was that 17th number from a series of logarithms that was used for the selection of these particular numbers. That, I should say is hearsay evidence on my part. I do not know that for a fact.

Mr. Rollins: The purpose, however of selection, you have to have some means of trying to get randomness, is that correct to make—I understand this witness said he made a stratification survey using the random method. I am confused more so than I ever was. He made a distinction between random and stratification survey. He said the

random survey is what the Literary Digest used, and it was not scientific. Now he says he has used random logarithms.

The Court: That would be for cross examination.

[fol. 271] Q. In your opinion is the use of random numbers more accurate for the purpose you are endeavoring to obtain, or less accurate, than if some machine had been used?

A. The use of random numbers is more accurate than if any kind of a machine had been used because in the use of any machine there is always some very slight bias that comes up.

Q. When you say bias, that to lay minds like myself imports a mental operation. When you say bias in connection with a machine designed to develop complete hazard what do you mean?

A. I mean there will be some slight variation from what is perfect representation.

Q. Because of mechanical imperfection, or inability to make machines mechanically perfect?

A. Inability to make machines mechanically perfect.

Q. In your opinion, does the system of random numbers produce greater randomness or greater hazard than any machine that has been devised?

A. Yes.

Q. Will you continue with the explanation of the process by which you made an array of incorporated communities of over 1,000 in Nassau County?

A. I was speaking of the selection of the third cluster. In Hempstead, actually the third cluster should fall in Hempstead because the random number that we found when we went to the table was less than the 7,000 population that was left over. We had also several other cities, several other localities which were larger than 10,979, so automatically they received at least one cluster, some of them also received two, and among these were, I believe, [fol. 272] Mineola, Garden City, Valley Stream and one or two others.

Q. Is this true, and I think this might shorten the testimony on the process of random numbers, you went from the highest to the lowest in incorporated communities of

over 1,000 in Nassau County until you had 27 clusters in the incorporated community division.

A. Did you ask me, if that is true?

Q. If not correct, please correct me.

A. No, it is not correct.

Q. Correct me and state what is the fact.

A. The correct point is each time we had to apply the sampling interval—

Q. That is 10,000?

A. That is 10,000, if we took a place where 10,979 persons lived, then that would not give an equal chance for all of those in between zero and 10,979 in this interval to fall. It becomes particularly important when we come to selecting the very many small towns, small communities I should say. Here we may find when we get down to communities of 2,000, let us say, we have to accumulate communities before we get to make up our interval, so in order to give each one of those communities an equal opportunity of falling each time we have to start with a random number, we have to select some random number between zero and 10,000 and wherever that number falls that town or that community would be selected, so that each of your communities therefore has equal probability of being selected in the sample.

Q. Because the random number might fall any place within the range of zero to approximately 11,000 people, which you call the interval; that is correct.

[fol. 273] The Court: He said yes.

Q. Will you go ahead, please.

A. This is the array we used for the selection of communities in which we are going to—

Q. That is incorporated?

A. That is incorporated communities which we are going to use in our sampling. We next had to select the unincorporated. In the unincorporated areas we have no data that tells us the population of the people; we have our data which only tells us the population of the structures; here again we make up an array which starts from the letter A and goes on down and we just mass those in order together with the total number of dwelling units which are—in each of these; you determine the total number of dwelling units

in the so-called psuedo town as we have called it, or an interviewing area, unincorporated area, just by physical count. They work through there and count every structure that falls in that area.

Q. I show you Exhibit J and ask you to point out to the Court just what you did in this connection?

The Court: He does not know, except we will assume you have the exhibit. Look on that Exhibit J.

The Witness: You can see we have counted every one of those, and we have also divided up into very small parts which were given numbers, were recorded, and the number of households in each one of those, each sub-division was determined as you can see by the sheet showing clusters, a cluster and size in area N.

[fol. 274] Mr. Grimes: May I have the exhibit, please?

Q. What do you call this sheet which you have just—

A. (Interrupting:) That is the cluster sheet, the cluster list.

Q. What is the sheet attached?

A. That is just the manner in which we used them, selected the cluster or we had skipped each of these until we got to the proper cluster, but I am not ready to talk about that just yet.

Q. Will you go ahead, please?

A. In selecting the unincorporated areas in which we would interview we again developed the sampling interval, but the sampling interval this time had to be in terms of dwellings and the sampling interval came out to be 3,040 dwellings.

Q. How did it happen to come out at that figure?

A. That is the total unincorporated divided by the number of clusters that are allocated to unincorporated, which is 32—32, right.

Q. Then the allowance made for the number of persons—

A. That is taken care of subsequently when we list—

Q. I meant in so far as the figure is concerned, we have an interval of 11,000 almost for incorporated?

A. Yes, that 11,000 interval, that is 11,000 people, that is comparable to 3,040 dwellings, but we do not have statistics on people in the unincorporated places, communities.

Q. Will you explain how you arrived at the figure 3,040. Does that have some relation to the number of persons per dwelling unit or how much?

A. We are not concerned with the persons, number of persons per dwelling in the determination of this figure. [fol. 275] We counted the number of structures that looked like dwelling units in the aerial photograph; we divided that number total by 32 which is the number of interviewing areas to be selected for the unincorporated, and that gave us a sampling interview of 3,040. We are not concerned at this point with the population, with the number of people at this point; that is determined later. First, we can deal only with the population we have, and the population we are concerned with, and the only thing on which we have any data by towns are dwelling units which we developed from aerial photography; in the selecting of areas we used exactly the same procedure we used in selecting interviewing places.

By the Court:

Q. Give it the way you want it.

A. In selecting an interviewing place in an unincorporated area we used the same general principles we used in selecting interviewing places in incorporated areas; we make up an array of pseudo towns or areas, starting with A, B, C, D, so on, then we start with a **random number** between zero and 3,040, and wherever that random number falls, that area is the first that is designated for an interviewing place. Then we used the sampling interval and random number for each succeeding one until we get our total of 34 interviewing places in an unincorporated area. At this stage we have selected the communities in which interviewing is to be done, and we have selected communities, we have—given each of these equal probability of falling; [fol. 276] we next have to select areas within the community and again we use a mathematical procedure. To go back to incorporated areas now, we take each of these towns that have been selected and we go through and divide it up into small clusters, and the clusters average in size about 25 to 30 dwelling units in a cluster, and we just go through the whole community and

divide it into these small clusters, put a number on them and make a list such as this one here for Glen Cove, in which we have a number of clusters and the number of dwelling units in a cluster; we make up this cluster sheet then for Glen Cove.

By the Court:

Q. Let me ask a question. Hold on to your train of thought. Where do you get the clusters to draw from?

A. Mark them. Just look at this map.

Q. Still returning to the map.

A. Using the aerial photograph we draw in on the aerial photograph.

Q. You use the aerial photograph map?

A. That is right, and then we have the same data for every one of the towns that have been selected. Well, now—

By Mr. Grimes:

Q. Pseudo towns at this point?

A. I am now talking about incorporated areas. Our purpose then is to give every one—actually we want every person in this town to have equal probability of falling in the sample, so we have to select our cluster with mathematical procedure to avoid using any judgment; all clusters must have an opportunity of falling. We know that there are—we know the number of people who live in this town, and we know the number of dwelling units in the town.

Mr. Grimes: Could we have a five minute recess at this point? He has been testifying a long time.

Q. Will you please give a little fuller explanation of the subject which you just discussed? Please. First of all there was the number I believe you wished to correct?

A. That is right. It has been called to my attention I have said above there were 32 and 34 clusters for interviewing in the unincorporated area. The figure is 32 interviewing places in the unincorporated area. In the development of arrays both for incorporated and unincorporated it is necessary to actually make a physical array,

and I should like to say to the Court these physical arrays were made for incorporated areas. This is simply how we make it; we start with Hempstead and each of these which are more than 10,979 necessarily has to fall, then we make our array of other towns in the townships, and the ones which are checked here in red are the ones in which a cluster is formed.

By the Court:

Q. Let me ask you a question. For instance, take Cedarhurst on this paper, in red we have the figure 2110.73. [fol. 278] What is that?

A. .73 point means nothing. The 2000 that is, where is the figure?

Q. Right there.

A. That means 211,073 people have been accumulated up to this point; the accumulation starts right here. The black figure is the number of people residing in that particular locality, community.

Q. How do you read that, for instance in Cedarhurst you have 60.21.

A. That is right. There are 6,021 people living in Cedarhurst. It just happens to be our adding machine is used also for dollars and cents, but the decimal point means nothing.

Q. The point can be disregarded entirely?

A. Disregarded.

Q. What does the 1 in a circle mean?

A. It means there was one extra taken from there.

By Mr. Grimes:

Q. How did that cluster happen to be taken from there?

A. Because that was where the person represented by the random number—that was the town in which he fell, in which he lived.

Q. You applied the process of random numbers to that array generally?

A. That is right, using the random number between zero and getting the total sampling interval.

The Court: Maybe this would be a good point to put in evidence this table.

Mr. Grimes: I offer what has been described by the witness as an array sheet in evidence.

Mr. Rollins: I object upon the ground it is incompetent, irrelevant and immaterial, and no proper foundation has [fol. 279] been laid.

The Court: I will receive it.

(Paper received in evidence and marked Defendant's Exhibit O.)

By Mr. Grimes:

Q. Did you have a similar array sheet for the unincorporated places?

A. Yes.

Q. Did you use the same process there?

A. I used the same process there except the population is that of dwelling units instead of people.

Q. The interval is therefore smaller?

A. Smaller intervals.

Q. The same principle is applied, same process?

A. Correct.

Q. Are these sheets available for inspection?

A. Yes, they are.

Q. You have them in court?

Mr. Grimes: Very well. I offer them for inspection if anyone cares to inspect them.

Q. Proceed, please.

A. The next stage in the development is the selection of the particular area in which we are going to interview. We have made out, we have developed small clusters of about 20, 25 dwelling units for all of the areas in the incorporated area in which we are going to interview, and all of the unincorporated area. Suppose that, well, Cedarhurst were a place in which we were going to select a cluster.

[fol. 280] Q. Suppose Cedarhurst came up by application of random numbers in the array.

A. That is right. It has about 1300 dwelling units. We would then, to pick a particular cluster in which interviewing is to be done, we would select a random number between zero and 1300, and wherever that supposedly random number—suppose the random number is 500, we would start

accumulating clusters, starting with cluster 1 and add to it the number of dwelling units in cluster 2, the number of dwelling units in cluster 3, so on until we had accumulated 500 dwelling units, and whatever cluster that 500th dwelling unit fell in, that would be the cluster we would use for interviewing in that community.

Q. When you say that is what you would do, do you mean——

A. That is the way it was done.

Q. You did it?

A. That is the way it was done.

Q. That is an accurate description of the process you individually did use, is that correct?

A. It is the process, but the number, 500 I have just taken out of the air.

Q. But that is the process?

A. That is the process.

Q. You did use in selecting the interview area?

A. That is correct. And the same process was used in unincorporated as well as incorporated.

Q. Would it be convenient for you to take Glen Cove as an example and demonstrate that process?

A. Yes, it would.

Q. Would you need Exhibit J?

A. It would help, yes. In Glen Cove, according to our sheet here, the cluster that was selected should have been cluster 95 in which there should be 39 dwelling units.

[fol. 281] Q. Exhibit I, if you will wait just a minute, which is Glen Cove, I would like you to make the process a little clearer to us all.

A. You can see here that Glen Cove is divided up completely into these small clusters and the clusters are numbered and we enter the numbers of the clusters and counted the number of dwelling units in the cluster and we list these on here, as I explained before, then we accumulate clusters from 1 until we arrive at the number which was the random number, and I can tell you——

Q. First you refer to our Exhibit I in evidence. Now, you have in your hand a series of pieces of paper, have you not?

A. Yes.

Q. What are those pieces of paper which you have in your hand? If you will, describe them briefly.

A. These are sheets which are a list of the clusters in Glen Cove, showing the cluster, number of the cluster and number of dwelling units in each cluster.

Mr. Grimes: I offer those in evidence as what was in fact done in the City of Glen Cove.

By the Court:

Q. These were prepared under your supervision?

A. Under my supervision, yes.

Mr. Rollins: Objected to, incompetent, irrelevant and immaterial, no foundation having been laid therefor. It is hearsay.

The Court: When you bring in incompetant again we will [fol. 282] have to go a little deeper, but if you will pass up the competency—

Mr. Rollins: I cannot waive it. I do not see how I can do it. It is absolutely hearsay.

The Court: I would have to sustain the objection unless the correctness of those figures can be in some way established.

Mr. Grimes: I will ask a few more questions. May we have this marked for identification so I may refer to it, please?

The Court: Yes, mark it for identification.

(Paper marked Defendant's Exhibit P for identification.)

Q. On this sheet, being Defendant's Exhibit P for identification I call your attention to a series of columns numbered from 1 on the first sheet to 100 where the series of figures under the heading D-U underneath and opposite each number 1 to 100. Would you please explain to the Court what the figure, for instance, 1-D-U opposite it means?

A. It means—

Mr. Rollins: That is an attempt to read from a document not in evidence.

The Court: He is just defining. He is not reading from it.

The Witness: D-U means dwelling units. In cluster 1, in Glen Cove this says——

The Court: They are not asking you for that purpose now, Professor. Well, he says D-U means dwelling units.

[fol. 283] By Mr. Grimes:

Q. Opposite number——

The Court: The next question would be where did he get the figure.

Q. Have you had occasion to check the figures under D-U against the matter, you, yourself?

A. I have checked some.

Q. Are those that you have checked accurate?

A. Quite accurate, maybe within one dwelling unit in a cluster off, but most of them exact.

Mr. Rollins: That depends on your official inspection.

The Court: That is enough on that. He physically did that himself.

Mr. Grimes: I offer it in evidence.

The Court: Are you not just dealing with one column, or are there more?

The Witness: (No answer.)

By the Court:

Q. Mr. Grimes asked you about the second column under the initials D-U. There are other columns there. What do they mean?

A. They mean the same thing in each case. This is the first 25 clusters, here is the second 25, or 26 to 50.

Q. So those beginning with the column on the left side are rotation numbers of the clusters?

A. That is right.

The Court I will receive it in evidence.

Mr. Rollins: I object to it on the ground specified, not limited to the contention, and it is based on hearsay; not [fol. 284] accumulated by this witness, but given to him by somebody else.

The Court: I will receive it.

(Received in evidence and marked Defendant's Exhibit P.)

Mr. Grimes: These various sheets I suggest be marked as one exhibit.

The Court: Yes.

By Mr. Grimes:

Q. Have you produced in court by the way, by what name you designate sheets such as are exemplified by Exhibit P?

A. The cluster list.

Q. Have you produced in court the cluster list for the entire County of Nassau?

The Court: By the various communities.

Q. All those communities selected by the process of random numbers.

A. Yes.

Q. What type sheets do you have? Representing what?

A. Representing incorporated and unincorporated.

Q. Wherever random numbers produce a cluster to be taken?

A. That is correct.

By the Court:

Q. Are they generally the same as Exhibit P?

A. Yes.

Q. The figures are different?

A. The figures are different.

[fol. 285] Q. Methods?

A. Are exactly the same.

Q. But the recordings are for the same purpose?

A. That is right.

By Mr. Grimes:

Q. I show you a file and ask you whether this includes the cluster sheets for your entire survey? If you will, look that over.

A. I would say that it does.

Mr. Rollins: Would it help in expediting this trial. Inasmuch as he testified to one cluster sheet in one community

I am willing to stipulate the testimony would be the same in other communities, reserving all my objections to the competency of the evidence and also as to exhibits.

The Court: And correctness?

Mr. Rollins: And correctness.

Mr. Grimes: Thank you. I will accept the stipulation.

Mr. Rollins: All these exhibits, dealing with the plan, not of its execution.

Mr. Grimes: Both plan and execution.

Mr. Rollins: You mean they had already been executed?

The Court: This is what they did.

Mr. Grimes: This is both plan and execution.

The Court: Plan, and plan executed as he moves along his testimony.

Mr. Rollins: Subject to my objection, all this testimony is not competent, relevant or material. Particularly I limit [fol. 286] it to the contention of the conclusion based thereon, as an expert is based on hearsay testimony on facts furnished by somebody else in which he himself did not participate.

The Court: He participated in supervising. We have not got to that yet. How did you want that marked? You have the stipulation.

Mr. Grimes: I accept the stipulation and I merely want the record to show we have produced them all in court for inspection by the Attorney General, and we accept the stipulation in that respect.

the select or fall numbers as you might say, with the various clusters are now established.

The Court: So that now you have passed the point where

The Witness: That is right. I have selected now all of the places where I am going to do interviewing.

The Court: Go ahead, we will hear a little bit more. Proceed on. You say there is still further?

The Witness: In developing our clusters we have dealt with aerial photography. These photographs were taken in April of 1950. Our study was made in November and December, 1950. There is a possibility that there is some error in our dealing with aerial photography, for two or three reasons; first, there may have been more buildings built in the given clusters since April, 1950; secondly, what

we may have thought looked like one family dwelling units were actually structures which may be two or more family [fol. 287] dwelling units, or maybe they were a garage. So in order to be sure we make no mistake on this and sure we take into account changes that occurred in population, we send out people whom we call pre-listers, to each of the clusters; and his function is to make a record of every dwelling unit in the designated clusters; and he is, the pre-lister, given a map which showed the man exactly where to go, where to start, and was given a sheet on which he listed all of the dwelling units. We have incorporated all of those pre-listing sheets and—

Q. You have one of them with you there?

A. I have here an example of pre-listing for Glen Cove. These people went out to a cluster in Glen Cove, and this is the map we gave them, which outlined that cluster. This shows them exactly where to go, and it is as you start here, and you go around the block in this fashion, then you come over here on this side of the street, around here and you end here, that is the end of the cluster, and he follows that and he makes a list of every dwelling unit that he encounters in going around this cluster. There may be a store on the first floor, but there may be a dwelling unit in back. He has to go and find out whether or not there is a dwelling unit in back, so we are sure we represent every dwelling unit that is in this block. This then eliminates any possibility we have made error or underestimated an area because the conditions of the map were different.

[fol. 288] By the Court:

Q. You said that he should. Did he actually do those things, pre-list?

A. I am sorry. I should have said he did.

Mr. Rollins: I object, hearsay on the ground what the other fellow says he did.

The Court: I will take it.

Mr. Grimes: I would like to offer those in evidence, one of Glen Cove.

The Witness: I have also Levittown.

The Court: We will take one first. It is offered. Same objection?

Mr. Rollins: Offered for what?

The Court: The witness has referred to it in his testimony. It is the pre-listing report that he testified to.

Mr. Rollins: I object upon the ground it is incompetent, irrelevant and immaterial, specifically based on hearsay evidence.

The Court: I will receive it in evidence.

(Paper received in evidence and marked Defendant's Exhibit Q.)

The Court: Now, might we ask you, Professor—

By Mr. Grimes:

Q. You have similar cluster sheets made of the entire area which was indicated?

A. For every area interviewed.

The Court: Pre-listing sheet?

[fol. 289] Mr. Grimes: Pre-listing sheet.

Mr. Rollins: Objected to, sample.

The Court: Yes, all subject to your general objection.

Mr. Grimes: I understand he objects on the grounds of incompetency, irrelevancy and immateriality?

Mr. Rollins: I will concede the witness will testify he made a similar pre-listing as evidence, without stipulating the correctness of it, of the facts stated by the witness, and without waiving my objection and the right to object to its admissibility, claiming it is incompetent, for the reasons advanced.

Mr. Grimes: This covers the entire area which was interviewed.

The Court: Yes.

Mr. Grimes: Will he make the same stipulation.

Mr. Rollins: As to entire Nassau County. He wants me to stipulate not specifically Nassau County, but the area covered by maps. I even go beyond it by saying all of Nassau County whether on the photographs or not.

The Court: That includes what you wanted?

Mr. Grimes: Yes. This Exhibit Q is the pre-listing sheet, is that correct?

The Witness: Yes.

By Mr. Grimes:

Q. What was the next step after that in connection with the survey?

A. (No answer.)

[fol. 290] By the Court:

Q. That evidence about Exhibit Q was just to pick up a possible error resulting from changed conditions, from the time the photograph was taken in April and the actual interview was done, did you say November, December?

A. November and December.

The Court: He wanted to cover that possible opening for error.

The Witness: The possibility, also, Judge that we may have counted something as a dwelling unit that was not, or there may have been more dwelling units in the structure than we thought there were.

By the Court:

Q. It is an absolute physical viewing of houses?

A. Exactly, so that we know now the number of dwelling units in each of the clusters.

Q. There is some other point you want to develop?

A. Yes. We now have to select dwelling units within the cluster in which we are going to interview. As I pointed out earlier, the chief aspect of design of this is that every person twenty-one years of age or over in the population of Nassau County, shall have an equal chance of being selected in the sample; some clusters varied in size, so the probability that any cluster would be selected when we were selecting the cluster in which we were going to interview, the probability any cluster would fall depends on its size; in other words, the larger one had a bigger chance of falling than a very small one, so if we took every household [fol. 291] in the cluster, then it would mean every household in the big cluster also had a big chance of falling, so we have to compensate for the big cluster by taking a smaller number of households in the cluster, and so we had to calculate for each of the clusters, we calculated the percent of households in which we were to interview. That meant then that in most of our clusters we had to eliminate certain

households, and in eliminating them we had to do that in such a way that every household in the cluster had an equal opportunity of remaining in the sample, of its being in the sample; in other words, we did this, suppose, and I will have to give you a supposition, say 80 percent of the dwellings that we were to interview, 80 percent of the dwelling units in the cluster—

Q. Will you please proceed?

A. I was discussing the manner in which we selected the dwelling units within the cluster that were to fall in the sample. I will use, if I may, Glen Cove further as an illustration. In Glen Cove about 75, actually 74 percent of the households in Glen Cove, in the cluster in Glen Cove, were to be used for interviewing, so we had to eliminate 26 percent of them, so that is actually roughly one out of four, so we selected this random number between zero and the total number of dwelling units that are in the cluster, and wherever that random number comes, that is where we start in our elimination; that first one, the one has a random number would be eliminated. We will go then, since one out of four is to be eliminated, we will go down to the fourth [fol. 292] household below the one that was selected by the random number, eliminate that, and then eliminate every fourth one beyond that. By starting with the random number we give every household in the cluster an equal probability of remaining in the cluster and we did that, as you may see here, in Glen Cove. Here is the list of dwelling units, and you will see every fourth one, roughly, in one case you will find perhaps there is three to interview, say actually 3.9 instead of four, so we always accumulated the 3.9 instead of four, so that after we have accumulated several of these the interval will be three instead of four and then it will return to an interval of four.

By the Court:

Q. You have indicated those particular dwellings on this Exhibit Q by a circle with an X in it?

A. Those are the ones that are to be eliminated.

Q. In lead pencil?

A. That is correct.

By Mr. Grimes:

Q. You repeated that process where interviews were to be taken?

A. That is correct.

Q. All 60 of the interview clusters?

A. Yes. Those are available here in court, too.

Q. You have those with you; all other sheets of similar import are here in court?

A. Yes.

Mr. Rollins: I will stipulate the same thing was done—I will stipulate the witness will testify the same thing was [fol. 293] done with respect to other areas throughout the entire area of Nassau County as testified by this witness, without stipulating the truth thereof; and further reserving my right to object to the testimony so stipulated upon the grounds heretofore urged, that same are incompetent, irrelevant and immaterial, and that same deal with matters of hearsay.

The Court: All right.

Mr. Grimes: May the record show all 59 similar documents are in court?

The Court: I think we ought to stop at this point for the day. Tomorrow morning.

Mineola, New York,
January 30, 1951.

Trial Continued

MATTHEW CHAPPELL, resumed the stand, having been previously sworn, testified further as follows:

Mr. Grimes: I would like first to make sure we have all our exhibits in order which relate to the Hofstra survey. That will take just a minute.

Direct examination.

By Mr. Grimes (Continuing):

Q. Professor, before continuing I show you a document and ask you to state merely by description without reading [fol. 294] the content, what this document is.

A. That is the array which we made up for unincorporated areas.

Mr. Grimes: I ask that be marked for identification.

The Court: Mark it.

(Paper marked Defendant's Exhibit R for identification.)

The Court: Why not mark it in evidence, instead of having it marked twice?

Mr. Grimes: I am going to call a witness shortly and I will put it in after calling that witness.

Q. Will you please proceed with your testimony, Professor?

A. We concluded, I believe, yesterday with the selection of dwelling units in each cluster. That was the last thing we discussed. After we have selected the dwelling units, the next step is to assure that each individual in the dwelling unit, in selected dwelling unit who is twenty-one years of age or over has an equal probability of being selected. If we had taken one respondent from each dwelling unit we have developed a bias in that we would have a much larger percentage of people from smaller homes, that is where there was one or two adults than we would have had from homes where there are three, four, five or more adults. In order to assure that we eliminated any such bias as that we used a technique in which we had the interviewer, when he went to the door, the first question he would ask was,—

[fol. 295] Mr. Rollins: I object. That would be purely hearsay. He testified he gave those instructions.

The Court: Yes. You gave those instructions.

The Witness: The interviewer was instructed to ask how many people there were in the home who were twenty-one years of age or over, and to list those first; male head of the household was listed on the first line, if there was a male head of the household, and the female head of the household on the second line; other males over twenty-one years of age or over following that and in order of age and other females over twenty-one in order of age. To assure that each person had an equal probability of being selected we made up these three sets of sheets which I will explain to the Court here. On one sheet there are ten, ten lines on

which we could list adults in the family, and we found no families in which there were more than ten adults, those adults were designated for interview who fell on each of the lines that were circled, and we used three forms; on one form line 1, 4, 7 and 10 were circled, on a second form line 2, 5 and 8 were circled, on a third form line 3, 6 and 9 were circled. These sheets which we call face sheets were attached to each interview, the order in which—

By the Court:

Q. Those face sheets are practically questionnaires?

A. Questionnaires, just to find out what people of twenty-one years of age and over are.

[fol. 296] Q. Did you say this sheet was the face sheet?

A. No, this is the questionnaire. This is the face sheet.

Q. The top sheet would be the face sheet?

A. Surely. If we were using this face sheet where lines 2, 5, 8 are circled, and we found that there were two adults in this household that the interviewer found, he was instructed to interview the person who fell on the second line, if he was using this form.

By Mr. Grimes:

Q. When you say, if, you mean—

A. (Interrupting) When.

Q. You are describing what you actually did?

A. I instructed interviewers to do. He was instructed when he was using this form and he found a household in which there was only one adult, there would be a name only on the first line, there would be no name on the line circled, so there would no interview taken in that household. Of course, if he was using the first form where line 1, 4, 7 and 10 are circled he must take at least one interview if there was one adult in the household which there has to be in every case.

By the Court:

Q. In other words, if you found no adult to conform to the circled figure, then was no interview in that dwelling?

A. That is right. Similarly, if there were two individuals

in that household who fell on the circled line as if, for example, if there were four in the household, and we were [fol. 297] using the form with one, 4, 7 and 10 circled there would be an adult fall on line 1 and line 4, and both then must be interviewed.

Q. What was the purpose of that procedure?

A. The purpose of this was to ascertain that every member of the household who was twenty-one years old or older had an equal probability of being interviewed, and no more than an equal probability.

Mr. Grimes: I offer these in evidence.

Mr. Rollins: That is objected to, incompetent, irrelevant, immaterial. That is the basis of my objection at this time.

The Court: I will receive them in evidence. Marked as one exhibit.

(Papers received in evidence and marked Defendant's Exhibit S.)

By Mr. Grimes:

Q. Proceed, please.

A. There is one more possible source of bias which we designed our sample to control, and that is bias which might be created by interviewing only those people who are at home when the interviewer calls the first time. If we had taken such a sample we would have had for the most part women, because the men are more often not at home.

By the Court:

Q. Is not that eliminated by your last forms?

A. That eliminates in part. Now I want to point out the interviewer has to go back until he gets the person who is [fol. 298] indicated. He cannot just go once.

Q. I think if you make that statement, that he must go back and get the person who falls within the circled number?

A. That is right.

Q. He does not just interview the person who answers the bell?

A. That is correct. We made five attempts to get the person who did fall on this line; in other words, the original interviewer, if he did not find him, then he went back at least four times, and of course, many were found before he

went back four times, but all together there were five attempts made to get every individual.

Q. You instructed him to make that many attempts?

A. That is right. That completes the direction for the development of the sample, and of the method.

Mr. Grimes: I would like to suspend the interrogation of the Professor at this point for the purpose of putting on Dot Counters, putting on every lister, putting on interviewers and putting on tabulators.

The Court: I think you can do that.

Mr. Grimes: And recall Professor Chappell later.

The Court: Any objection?

Mr. Rollins: Not at all. I had suggested—

The Court: Maybe we can find a pattern where we could just examine a few and have a stipulation with respect to the others.

Mr. Rollins: That is my idea. May the record show I [fol. 299] reserve my right to cross examination?

The Court: Yes. Anyway the direct examination is not complete.

HILDA BARNES, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 45 Tudor City Place, New York City.

Q. Will you state what your education has been, degrees?

A. B. A., University of Michigan.

Q. What year?

A. 1942.

Q. What did you do after receiving your B. A. degree, by way of jobs?

A. I worked in the research department of an advertising agency.

Q. What agency is that?

A. Kenyon & Eckardt.

Q. Where are they?

A. That is New York City.

Q. For how long?

A. Three years.

Q. What years were those?

A. 1943 to 1946.

Q. After that where did you go?

A. I worked for Alfred Politz Research, Inc.

Q. Politz?

A. Yes.

Q. For how long?

A. A little over three years.

Q. What years were those?

A. 1947 to 1950.

Q. What did Politz Research do? What was their business?

A. They conduct polls for surveys.

Q. What did you do with Politz?

A. I worked in the sampling department.

[fol. 300] Q. You have done a number of samples prior to working on the Hofstra sample?

A. Yes.

Q. You did work on the Hofstra sample?

A. Yes, I did.

Q. How many samples had you worked on for Politz, just approximately how many?

A. I honestly don't know in numbers. I did over 20 I would say.

By the Court:

Q. A week, a month? Could you give it that way?

A. (No answer.)

The Court: Over 20, that is good enough.

By Mr. Grimes:

Q. In connection with the Hofstra survey will you state please, what you did?

A. I worked on the sample, well, selection of the communities; I counted, I put a photograph together and worked on counting a portion of the households.

By the Court:

Q. Did you have some title in the setup?

A. No, I don't believe so.

By Mr. Grimes:

Q. I show you Defendant's Exhibit I in evidence, being aerial photograph of Glen Cove City, cluster No. 15 and ask you whether you did work in connection with that cluster?

A. Yes, I did.

Q. Would you state to the Court what you did, please?
[fol. 301] A. I put the various photographs together, then outlined Glen Cove from another map showing its boundaries, then I counted clusters.

Q. With specific reference to counting clusters state what you did do.

A. I started in one corner of the photograph and counted blocks each of dwelling units I could see from blocks.

Q. From the aerial photograph?

A. Yes, then—

Q. Just for the record, did you count them accurately?

A. As accurately as I could.

Q. What was the next step?

A. I numbered each block on the photograph and I put a corresponding number on the cluster list sheet, and entered the number of dwelling units.

Q. Proceed, please.

A. I counted any specific block or area on the cluster sheet.

Q. I show you Exhibit P in evidence and ask you if that is the document which you worked with or from?

A. Yes.

Q. Would you state to the Court what you did with reference to that?

A. I entered the counts for each of the clusters on this count sheet, then this sheet was totaled and it was divided into clusters, each cluster having at least 25 dwelling units, so that would be one cluster and two and three would go together, and that would be one cluster, and combined them so each one had at least 25 dwelling units, and I selected

a random number between zero and the total number of dwelling units in Glen Cove.

Q. Then what?

A. Then I accumulated the clusters, added the clusters down until I found the cluster which had been selected to be interviewed.

[fol. 302] Q. You found that by a process of random numbers?

A. Yes.

Q. You did that work yourself?

A. Yes, I did.

Q. I show you Defendant's Exhibit R for identification and ask you to describe to the Court what that is, and then state what you did, if anything, in connection with it.

A. That is an accumulation of unincorporated areas; unincorporated areas had been divided into, I don't remember the exact number of parts, and they were lettered pseudo towns, lettered A through N and I guess there were some extra letters in there, too; this was just an accumulation of those areas that had been counted from the photograph.

Q. Did you do some of that counting yourself?

A. Yes, I did.

Q. It appears on that exhibit?

A. Yes.

Q. Did you check the total?

A. Yes, I did.

Q. Did you apply a process of random numbers to it?

A. Yes.

Q. Those then became clusters?

A. Ultimately became.

Q. Part of the sample?

A. That is right.

Q. You did that work yourself in that exhibit R?

A. I worked with this, well, yes, I worked with this sheet.

By the Court:

Q. With respect to this Exhibit R, what is that 399?

A. Area we designated as A we counted 399 structures.

Q. You did that by inspecting the aerial photograph?

A. Photograph, yes.

Q. Then B?

A. In B, after we designated the area there were 3,245.
[fol. 303] Q. You designated B and counted again?

A. Yes. See, we designated all the areas before we counted.

Q. Then I notice you add these as you go along so when you finish you have a total of the dwellings you counted?

A. Yes.

By Mr. Grimes:

Q. Did persons other than yourself, also do dot counting?
A. Yes.

Q. Was the process similar, if you know, to the process you went through in dot counting?

A. Yes, it was.

Q. You know about how many other persons there were who did dot counting process in connection with all the dot counting that was done and in connection with sampling?

A. I would say about 12.

Q. Were they Hofstra students for the most part?

A. Yes, they were.

By the Court:

Q. Did you watch them do their work?
A. Yes.

Q. Did they do it, as far as you could see, in the same manner you were doing your work?

A. Yes.

Q. They kept the same records?

A. Yes.

By Mr. Grimes:

Q. Did you supervise their work?
A. Yes, I did.

Mr. Grimes: I now offer Defendant's Exhibit R in evidence.

[fol. 304] Mr. Rollins: I object to it upon the ground it is incompetent, irrelevant, immaterial, serves no issue and has no probative value at all.

The Court: I will receive it in evidence.

(Defendant's Exhibit R for identification was received in evidence and marked Defendant's Exhibit R.)

Mr. Rollins: I reserve all objections, because as I have maintained, the poll system——

The Court: Yes. We have that in mind. You need not repeat that.

Mr. Rollins: There is another ground I intend to bring out on cross examination.

By Mr. Grimes:

Q. I show you Defendant's Exhibit O in evidence and ask you to state what you did with reference to that, please?

A. Using the preliminary census report——

Q. First, what is that?

A. That is an array of incorporated towns over a thousand in Nassau County.

By the Court:

Q. When you say towns, again you mean communities?

A. Communities.

By Mr. Grimes:

Q. Yes.

[fol. 305] Mr. Grimes: Excuse. I would like to ask one question preliminary to that.

Q. Defendant's Exhibit R represents, does it not, all of the unincorporated areas in Nassau County?

A. Yes.

Q. And the exhibit which you have in your hand is O in evidence, represents incorporated, is that correct?

A. All but one. This represents 27 clusters.

Q. All but one cluster? What is the other cluster?

A. That cluster is one that is in a town that is under a thousand population.

The Court: Community, you mean.

The Witness: I am sorry, community, and was not in the census preliminary report.

By Mr. Grimes:

Q. Is that reflected or not in unincorporated areas represented by Exhibit R?

A. No, it is separate.

Q. Will you state please, what you did in connection with the exhibit number in your hand?

A. From the census report I selected all towns that had more than an approximately 11,000 population, because they were pre-selected, and I accumulated those towns—

By the Court:

Q. That figure was 10,975, was it?

A. That is right.

Q. Let us adhere to that figure.

[fol. 306] A. That accounted for 195,066 in population. The rest of the population was divided into three townships, the rest of the incorporated population, with communities over a thousand, and then those townships, towns were arrayed from high to low.

The Court: I do not think the young lady has stated that as well as she could. If you would tell us, in answer to Mr. Grimes' question, what did you do with respect to Exhibit O? How did those figures get on there? Make it a more detailed answer. You have a large wealth of knowledge about this subject, and the rest of us do not, so you may go more into detail.

The Witness: Surely. From the census reports, the census reports list the incorporated communities over a thousand and I selected the towns that had a population—

The Court: Towns? Will you avoid that word?

The Witness: I am sorry. Communities that had a population of more than 10,979 people, and I added those on this tape starting with towns with the largest population and going down to one with the smallest population.

By the Court:

Q. You meant towns there, did you?

A. No, I am sorry again, I meant communities. That accounted for 195,066 people. The balance of the population in the incorporated communities was then divided into three

[fol. 307] townships, Hempstead Township, North Hempstead and Oyster Bay, and then those townships, the communities were then accumulated starting with the community with the largest population and going down to the community with the smallest population.

Q. When you say community in a town do you mean village?

A. Yes.

Q. The village is incorporated?

A. Incorporated area, it would either be a city or village within the Township. First, we accumulated communities with Hempstead Township.

By Mr. Grimes:

Q. When you say accumulated, you mean you added the population of one to the other?

A. That is right, net total for each, after each town was added.

Q. Go ahead, please. Then you applied random numbers?

A. Then we applied—we divided the total population into your 27 parts and using and 10,979. We took a random number between 0 and 10,979, to determine where our clusters were, in what communities our random number fell.

Q. What did you do with reference to the survey?

A. (No answer.)

By the Court:

Q. That would be a selected cluster?

A. Yes, that was a selected community. And by that we determined, well, a town like Hempstead, they had 29,000 people, had three random numbers that actually fell within that town, and therefore got three clusters.

[fol. 308] By Mr. Grimes:

Q. But where the random number fell, that became a cluster, and from that you worked out the place in which the interview was taken, is that right?

A. Yes.

RECESS TO 2 P. M.

Mr. Grimes: We have available all the other counters and we can call them and get their testimony, establish that they carried out their instructions by counting dots in these clusters.

The Court: Substantially the same as Miss Barnes?

Mr. Grimes: Substantially the same as Miss Barnes.

Mr. Rollins: I do not know about the experience of the rest of them. I understand some of them are just students.

Mr. Grimes: Their testimony would be—

Mr. Rollins: I do not know whether it would be as clear as this witness's testimony. I would want to have them around.

The Court: You cannot consent to that at this time?

Mr. Rollins: At this time.

The Court: We will call the students after lunch, so you can get some idea of the different classes of workers. We will recess. I think the qualifications of the interviewer would be in his mind before he consents to any pattern of taking testimony.

RECESS TO 2:05 P. M.

[fol. 309]

Afternoon Session

HILDA BARNES, resumed the stand in behalf of the defendant, and testified further as follows:

Direct examination.

By Mr. Barnes (Continuing):

Q. There was a 28th cluster, was there not, in the incorporated community group?

A. Yes.

Q. Would you state how that cluster came into being and was polled?

A. The 28th cluster came from the group of communities that had a population of under a thousand in the 1950 preliminary census.

Q. Were they added together?

A. Yes, they were.

Q. They became the 28th cluster of your group?

A. Yes.

Cross-examination.

By Mr. Rollins:

Q. All you did was merely count clusters, is that right?

A. No.

Q. You did not formulate any scientific plan on which this Hofstra poll was formulated?

A. No, I did not formulate the plan.

Q. This was all under the generalship of Professor Chappell?

A. No.

Q. I mean by that, supervision?

A. Yes, I guess under the general direction.

Q. He was the man formulated the plan, is that right? Or did you assist in formulating the plan?

A. No, I did not assist in formulating the plan.

Q. If I understand you correctly, you pasted aerial photographs on this map?

A. Yes, I pasted those particular ones.

[fol. 310] Q. What exhibit is that?

A. I.

Q. That did not take any particular scientific knowledge to do that, did it?

A. No.

Q. Did it take any specific scientific knowledge to count clusters?

A. No.

Q. You just merely did the problem of arithmetic, is that right?

A. Yes.

Q. How long did it take you to do your task?

A. In actual hours?

The Court: Yes, how long did it take you to do your task, whether it was spread over a long period or not.

Mr. Grimes: I am going to object to that until we know which task he referred to.

The Court: Her entire task in connection with this study.

By Mr. Rollins:

Q. Hofstra poll.

A. Say about 70 hours.

Q. That covered a period between what dates?

A. I don't remember the exact dates, I believe it was either the end of October or the beginning of November.

Q. Is that the time when you started or ended?

A. I don't remember what date I started on or ended on, but it was within that period.

Q. The year 1950?

A. That is right.

Q. Were you employed at any other occupation during that period?

A. Yes.

Q. This was something on your own time?

A. That is right.

Q. Did you get paid for it?

A. Yes, I did.

[fol. 311] Q. Who paid you for it?

A. Well, I don't mean directly. Mr. Simmons paid me.

Q. Who is Mr. Simmons?

A. Well, he is the person I worked with on the sample.

The Court: Do not we have the statement here that the defendant paid for this?

Mr. Rollins: That is what I want to find out.

The Court: That is in the record, undisputed.

Q. How much did you receive?

A. \$150.

Q. When you started on this project were you told the purpose for which your services were employed?

A. Yes.

Q. Were you told that your services were for the purpose of obtaining an opinion based upon evidence to be presented in this trial?

A. Yes, I believe I was.

Q. Are you a licensed private detective?

A. No.

Q. Were you ever employed by a licensed private detective?

A. No.

Q. Were you deputized by a licensed detective agency or private agency?

A. No.

Mr. Rollins: Section 71 of the General Business Law makes it a crime for any person to aid or abet the obtaining or gathering of evidence to be obtained in a civil trial action, and I maintain any evidence which has already been presented or gathered for that particular purpose violates the law, criminal statutes and the evidence is not admissible. [fol. 312] Mr. Grimes: I am going to ask—

The Court: Are you making a motion?

Mr. Grimes: This is said for the purpose of other witnesses. It is false. Secondly, even if it were true the evidence would be admissible. I move the remarks, if that is all they were of the Attorney General, be stricken from the record and I ask the Court to state to those witnesses or any other witness no crime was committed whatsoever.

Mr. Rollins: I move to strike out all the testimony of this witness upon the ground it appears affirmatively from the testimony she was paid and hired for the specific purpose of aiding, obtaining evidence to be presented in this trial, which is a civil litigation, and it appears affirmatively this witness was not an operative of a licensed detective agency, or employed by a licensed detective agency as required by Article 7, which consists of Section 70 et seq. of the General Business Law.

The Court: I am quite surprised to hear there is any such law. In every case I think there must be a great many violators.

Mr. Grimes: If there is such a law, I will have several motions to make. Might I ask whether Mr. Seaton is a licensed investigator on behalf of the State? Is he in court?

Mr. Rollins: Surely is.

Mr. Grimes: Of course, I know you won't.

The Court: Check there where that excluding language is. [fol. 313] Mr. Grimes: The only person in this whole case who even sounded like a private detective is the man who says he was formerly a special deputy superintendent of banks, now a bank examiner, who says he can conduct an investigation. That is the only evidence we have of a detec-

tive. Everything laid down is absolutely proper and it will continue to be so.

The Court: The Attorney General is misled by this language, without a doubt. That language is introduced by the general statement under the defining of the term, private detective business. It is introduced by the word including private detective business, shall include, then when you get down to various inclusions which are separated by a semicolon in this statute, location, lost property affiliation with reference to a person seeking employment, with reference to the conduct of the securing of evidence to be used before any authorized investigating department, Board of Award, Board of Arbitration, or in the trial of similar criminal cases. The language only means that a private detective business includes the activity of securing evidence to be submitted to a court. It does not indicate no other person can do the same thing. The motion is denied. Let us proceed.

Mr. Grimes: Thank you very much.

The Court: Counsel was cross examining.

Mr. Rollins: I also move to dismiss the testimony of this [fol. 314] witness upon the ground it is incompetent, irrelevant and immaterial, and not within the issues. May I take an exception to your Honor's ruling?

The Court: I will take your motion and I will say I will overrule the motion for you. Move again at the end of all the testimony to embrace every witness and every exhibit and every utterance. Any questions?

Mr. Rollins: No further questions.

WILLARD R. SIMMONS, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 515 Carroll Avenue, Mamaroneck, New York.

Q. Mr. Simmons, you heard the Judge's ruling upon the motion of the Attorney General, no crime has been com-

mitted in connection with the survey, so you do not have to be afraid.

A. Yes.

Q. What is your occupation?

A. I am a consultant in market research and sampling problems.

Q. Are you familiar in a general way with the Hofstra survey which is being introduced in evidence in this case?

A. Yes, I am.

Q. Did you count some dots?

A. Yes, I did.

Q. Can you count?

A. Yes.

Q. What is your professional occupation?

A. Statistician and sampling consultant, market research consultation.

[fol. 315] By the Court:

Q. What is that word?

A. Market research consultation.

By Mr. Grimes:

Q. Will you state very briefly what you have done in market research? First your education.

A. Well, B.A., University of Richmond, M.A., Duke University.

Q. What did you do after you received your M.A.? What sort of business did you go into?

A. I taught for several years, then I was hired—

Q. Where?

A. My early teaching was in high school in Virginia, after which I became statistician for the State Department of Welfare in Virginia, that was in 1940; I went with the Federal Government in 1941, worked there as a statistician in 1941 until 1947, when I took a position with Politz Research as head statistician, served there three years, after which I became a private consultant in sampling.

Q. Are you a mathematician?

A. Yes.

Q. Have you gone into higher mathematics?

A. Yes, I think I can say that.

Q. Did you count dots in connection with this survey?

A. Yes, I did.

Q. What area?

A. I counted the area on the map noted as area K, which was one of the areas of the unincorporated area of Nassau County.

Q. What other sub-division?

A. I also counted part of the unincorporated area in Oyster Bay Township, adjacent to the Village of Oyster Bay.

Q. I am not going to ask you any specific question with reference to this next matter, but you did other work? [fol. 316] Just answer this yes or no, in connection with this survey, is that correct?

A. Yes.

Mr. Grimes: I think I shall call this witness later on another subject, but I want to go into the dot subject at the present time.

Q. Have you mapped all the localities in which you personally counted dots?

A. No. The difficulty of giving particular designations, which have no special meaning to us than just identifying the area in the County and unincorporated area. It is segregated in one set of maps to be counted, so that we can divide the work up in appropriate divisions for each person to work on.

Q. Did you work with Miss Barnes in connection with that count?

A. Yes, I did.

Q. Also counted dots?

A. That is correct.

Q. As to the dots which you counted did you count them accurately so far as you know?

A. Yes, of course.

Cross-examination.

By Mr. Rollins:

Q. You are not a licensed detective, are you?

A. No.

Mr. Grimes: I object.

The Court: I sustain the objection. Immaterial.

Mr. Rollins: May I, for the purpose of the record? I offer to examine this person on the claim or contention advanced with reference to the testimony of Miss Barnes, and I submit that sincerely.

The Court: Put it on the record, but I consider it immaterial.

[fol. 317] By Mr. Rollins:

Q. All you did was just merely count dots, is that right?

A. No, that is not all I did. I counted dots.

Q. That does not require any great skill or special knowledge of higher mathematics to be able to count dots?

A. No.

Q. You worked exclusively under the control of Professor Chappell?

A. Under his over-all supervision, I would say.

Q. You were not his consultant, were you?

A. Yes.

Q. He consulted you?

A. Yes.

Q. Were you the specialist on this job, or was he?

Mr. Grimes: Objected to.

The Court: Allowed.

The Witness: I was a specialist.

Mr. Grimes: If he can answer yes or no.

The Witness: I was a specialist on the job.

Q. You were a collaborator, you claim to be a collaborator of Professor Chappell on this Hofstra poll?

A. Yes, with respect to sampling.

Q. As a matter of fact, this is not a Hofstra poll, is it? It was a poll for this litigation, Franklin Square Bank people?

A. As far I knew it was a Hofstra poll.

Q. Were you paid by Hofstra College?

A. As I remember my check was made out that way.

Q. Do you mean you believed you were making a poll for academic purposes of the College?

A. I did not inquire into the purpose.

Q. You did not know this was to be used in this litigation?

[fol. 318] A. No, I did not know it would be used in this litigation.

Q. Did you believe this work that you were doing was to serve a school of learning?

A. Indirectly, yes.

Q. What do you mean by that?

A. The school was doing the survey; they asked me to do the sample. I inquired no further. They asked me to work with Hofstra.

Q. You mean to tell me you never knew this survey was made to serve litigation purposes of the Franklin Square National Bank?

A. Yes, I can say yes to that.

Q. Do you know now it is being used for this particular purpose?

A. Yes.

Q. Is this the only time you ever found this out?

A. No.

Q. When did you find out before this date?

A. That I don't remember. It was sometime during the course of this sample for which I was called in as a consultant to work with Dr. Chappell in carrying on conversation with others what it was to be used for, I acquired knowledge it was being done for a client with which the bank was connected. I cannot say exactly when that knowledge came to me.

Q. Client of whom?

A. Client of those engage- in the survey, particularly Hofstra.

Q. You were employed by the College? Does the College have any clients?

A. I don't know.

Q. When was this knowledge that you acquired, your efforts were to be engaged in acquiring evidence to be presented in this litigation? Give me the exact month or period.

A. I have not the vaguest notion.

[fol. 319] The Court: He answered that. He said he did not know. It was sometime during the period the survey was being taken. He said that in his former answer.

Q. Would the month of September, October, refresh your recollection.

A. No, it certainly would not. In this case I had no particular interest in who the survey was being done for.

Q. How much were you paid for your efforts in this matter?

A. I was paid a fee which covered some other persons' activities, too. That fee was \$650.

Q. For this activity in this case and some other activity, too?

A. If you mean by this activity, counting dots, no.

Q. I am talking of all your efforts in relation to the so-called Hofstra poll.

A. Yes, for the Hofstra poll I was paid \$650 which half was to be used to defray other expenses than personal fee.

Q. That was in connection with this very same sort of Hofstra poll?

A. It was to be used in connection with the Hofstra poll, Hofstra survey exclusively.

Q. Did I understand you to say that the \$650 was paid by Hofstra College itself to you?

A. To the best of my understanding, yes.

Q. Is it possible you received a check from the defendant, Franklin National Bank or their counsel?

A. That I am sure I did not receive.

Q. Did you receive it from Professor Chappell?

A. Yes, I received it from Professor Chappell. I just don't recall how the check was made out, who made the check out, but I am dead sure it was not the bank.

[fol. 320] Q. Are you certain it was paid by the College, by check of the College?

A. I can only know the Doctor gave me a check.

The Court: He just answered he does not know who made the check out. He knows that Dr. Chappell handed it to him. That was his answer.

Mr. Rollins: I move to strike out the witness's testimony on the ground it is incompetent, irrelevant and immaterial. His testimony was in connection with an investigation to discover evidence to be presented in this litigation, and violative of Article 7 of the General Business Law.

The Court: That is as far as you need go, and that makes the record. I will deny the motion.

By Mr. Grimes:

Q. Will you state just what you did in connection with the survey, please?

The Court: This will be considered direct examination. Counsel is now availing himself of the reservation he made to call this witness to develop a broader point.

Mr. Grimes: Well, yes.

The Court: It could be both, but if it is to be re-direct, it would have to be very narrow. But this question asked now would hardly be proper, but suppose you take it on recalling the witness. Is that what you are doing now to develop this whole activity?

[fol. 321] Mr. Grimes: I would rather for the most part on direct, call him at a later date, but I would like to ask him in what capacity he did serve here.

The Court: You may develop what the service amounted on re-direct, because on cross examination he was asked what he got for it. You have a right to show his pay was commensurate with the work he did. Go ahead.

Q. Please state what you were employed to do, what you did do.

A. I was retained by Professor Chappell to work with him on designing a sample to be used, planning the procedure and the basis for selecting the areas which were to be visited by the interviewers, and to also write up, explain in detail, how that was done.

Q. Would you say you were engaged in a consulting capacity with Dr. Chappell?

A. Yes, I was engaged as a consultant.

Q. Is that field, sampling designs, something which you have engaged in for a number of years?

A. Yes. I have been working in sampling work for seven or eight years.

Mr. Grimes: That is all I want to ask now. I want to reserve the right to call this witness at a time I think would be more appropriate.

By Mr. Rollins:

Q. Your specialty you said was in the marketing field, is that right?

A. Currently, yes.

[fol. 322] Q. In the marketing field it is a matter of business activity to determine what we call in the trade, sales resistance to a given commodity by inquiring of people, calling?

A. I have never done such.

Q. You never made a poll to determine whether an article was desirable from the sales point of view?

A. (No answer.)

Q. You know what I mean, don't you?

A. Yes. Well, things that border on that.

Q. Let us assume for example, there is a cosmetics submitted to you in connection with your work to determine whether or not it could be sold at a profit, your service would be to ascertain that fact in the market field?

A. No, indirectly only in the sense I am called in for sample work primarily. If a survey may be used for other purposes it seldom concerned me.

Q. When you speak of polling, it is a matter of getting public opinion as to a commodity, whether it could be sold in the market, is that not what that would mean, marketing?

A. Not entirely by any means, market surveys are conducted for many reasons.

Q. In the generally accepted sense?

A. I do not consider that to be the sense.

Q. Would the sense I intend to question you on, that is, namely, to determine sales resistance of a commodity come within your field of endeavor or don't you understand what I mean?

A. I am not sure I do.

Q. Supposing a client gives you a certain product, say a cosmetic under a new formula and he wanted to find out whether it could be sold in the market, for you to obtain [fol. 323] public reaction, would he retain a service such as yours? Would it come within your field?

A. It would not come within my marketing field.

Q. But there are other persons engaged to determine that sales resistance?

A. I think so.

Q. Surveys made by testing public opinion on that?

A. Yes, I think they are.

Q. In relation to marketing as you say you are a specialist in, what would your field cover in determining the kind of reaction?

A. I have specialized in sample work as I said before.

Q. What, test?

A. No, sample poll.

Q. Public opinion, is that not right?

A. No, drawing samples in which we select persons, households, business firms or other units to be used as a basis for inferences regarding a larger group.

Q. Marketing means the sale and purchase of something, is that right?

A. Yes.

Q. And to obtain the public opinion in that field it is necessary to obtain the reaction of the public, is that right?

A. Not always an opinion, sometimes facts, sometimes objective questions are asked as to what they might have done or bought. That phase of it I am not engaged in.

Q. But to determine what?

A. I don't understand your question.

Q. Sales resistance or price, or marketing.

Mr. Grimes: I object to that; already asked and answered several times.

The Court: The witness answered he does not understand. Or, you did say, add something to the question. Maybe you better reframe the question for one he understands.

[fol. 324] Q. Your subject you say is the developing or ascertaining public opinion dealing with a subject called marketing?

A. No, I did not say that.

Mr. Grimes: That is contrary to all the testimony he has given.

Q. Did you not say something about marketing before?

A. Yes, I said something about marketing before.

Q. What did you say about marketing?

A. I said I was a consultant in sampling problems in marketing research.

Q. Sampling what?

A. Sampling people, households, business firms, service stations, retail outlets.

Q. To obtain an opinion, is that not right?

A. I did sampling to obtain an opinion? No.

The Court: Have you completed your answer? Have you finished?

The Witness: Yes.

Q. Your object in sampling is to ascertain a different point of view, if any there exists by comparison?

A. No, that is not my objective.

Mr. Grimes: That is not comprehensible as a question.

The Court: Allowed.

Q. What do you intend to ascertain in relation to that marketing subject you talked about, by making a sample poll?

A. Maybe I can clear this by simply saying I am retained usually to select samples, other people use samples for visits [fol. 325] and obtain opinions. That is not part of my province.

Q. You mean set up machinery to obtain this opinion from the public?

A. I mean selecting the individuals who are to be included from the population in the survey, the people to be visited by the interviewers if you like.

Q. You mean you are setting up groups to obtain stratified opinion?

A. Yes.

Q. In other words, you are setting up a specialized group to get a cross section of opinion?

A. Yes, that is it.

Q. That is the only way you can get a stratified opinion, isn't that right?

A. What is the only way? I am not sure that this—to get a really stratified opinion or report?

The Court: I would like to hear the question.

By Mr. Rollins:

Q. You understand what I mean by a stratified opinion. Before I finish do not express an opinion before I finish. It is essential you get a cross section of opinion, isn't that right?

A. Of opinion?

Q. That is right, cross section of people, let us take it that way.

A. Yes.

Q. So in order to determine test preference you would have to get professional people, you would have to get laboring class, white collar group and the like, would you not, before you could determine the opinion poll of a stratified basis. Is that not right?

Mr. Grimes: I object to this as irrelevant, because there is no opinion poll here.

[fol. 326] The Court: I think counsel has the right to question the competence of the witnesses.

Q. So in order to determine, test the preference, you would have to get professional people, you would have to get the laboring class, white collar group and the like, would you not, before you can determine the opinion poll on a stratified basis? Is that not right?

A. The question is a little technical in this sense.

Q. It surely is.

The Court: Answer first, yes or no, or you cannot answer.

The Witness: I do not think that is susceptible to yes or no answer.

By Mr. Rollins:

Q. Give me your best answer.

The Court: Give your best judgment to that question if you can.

The Witness: If one were to set out to discover taste or any quality possessed by the population, in taking a sample to do so he may or may not stratify, and if he does stratify the population he need not use such characteristics as you mention, referring to occupation, profession, labor—that

need not go in it. One can still take a sample without recognizing those groups as such, without even knowing how many people of each such group is in the population. There are many ways in which a sample operation might be conducted.

[fol. 327] Q. If it is not done that way then it is a poll by random, is it not?

A. No, not necessarily.

Q. You mean to tell me if you just go ahead and pick out a house in a certain district, a certain street, without finding out who lives there, what their earning capacity may be, you could determine whether or not the person is desirable, or desirous of opening up any special bank account, is that right?

A. No, I don't mean to tell you that.

Q. In making your survey here, did you know whether or not the plan set up here in which you say you collaborated, whether persons who were questioned by the interviewers worked for a living or had any income?

A. No. I knew nothing about the people individually. I know that by the method of selection used we must necessarily get into the sample various occupations in the approximate proportion as they exist in the population because the probability theory underlying the thing is such that that must inevitably occur.

Q. In other words, you, a professor, did not think it necessary in order to establish knowledge on the part of the public as to all types of bank accounts whether or not the peoples interviewed had money to deposit?

A. No, we did not consider that necessary; no, it was not necessary.

The Court: In formulating the survey?

Q. In formulating the survey, is that right?

A. That is right.

Q. In other words, whether a fellow who never worked for a living, was a hobo, or was supported by a rich relative, that formed no matter in your calculation?

A. Not one whit.

[fol. 328] Q. All you were interested in was finding out

whether people, whether they knew the terms set forth in Exhibit D-G?

A. Is that a question?

Q. Yes. Those are the questionnaires.

A. I had nothing to do with questionnaires.

Q. But you were a consultant, as a specialist?

A. On a sampling problem, may I remind you.

Q. You are not accepting responsibility for the poll?

A. No, I am telling you I am accepting responsibility for the sample for this particular college I was concerned with.

Q. Did you not?

A. Yes, I saw a copy of the report.

Q. Did you disapprove of it?

A. No, I certainly did not. On the contrary, I approved of it.

Q. That was after examining the entire survey?

A. Yes.

Q. Am I correct in stating that 928 people were interviewed in the entire survey?

A. It was approximately that, certainly.

Q. Do you know if there was any one individual of that 928 people that had a job?

A. I don't know of such an individual, but I am dead sure there were some.

Q. Is that your opinion or a guess?

A. I am sure there were some.

Q. Based on what factor would you say it was dead sure they had jobs?

A. Because of the fact that the sample used in this survey could not possibly have contained 928 people without having at least some who were employed, and it would be an extremely remote possibility it would not exist in the sample in the same proportion as the population.

Q. You say there are not 928 out of 666,000 people in [fol. 329] Nassau County who do not work for a living?

A. No, I did not say that.

Q. Your statement about there must have been some had a job; could you point out the name of one of your survey had a job?

A. I don't know the name of any one in the survey.

Q. Would your records in the survey indicate any?

A. I believe the interviewers will indicate that.

Q. You mean on reports made?

A. I don't know.

Q. Did you see any reports made about job earnings of families interviewed?

A. No.

Q. That is what you call a stratification in that case, is that right?

A. No.

Q. What kind of an investigation would you say you made?

A. (No answer.)

Q. I mean stratified poll, let us call it that way, as you call it.

Mr. Grimes: He did not call it that way.

Q. Do you call this poll testified to by Professor Chappell a stratified poll?

A. I did not.

Q. What do you call it?

A. The probability sample of people in Nassau County over twenty-one years of age.

Q. It is not a stratified poll, is it?

A. Stratified?

Q. Yes or no. Let us not quibble.

A. I cannot answer that yes or no.

Q. Is it a random poll?

A. I cannot answer that directly. That cannot be answered directly.

Q. What kind of poll is it?

A. Probability sample.

[fol. 330] Q. What is the margin of error?

A. The approximate margin of error on this poll will turn out to be, it will be a different, of course, error margin for every characteristic, every estimate in the report, therefore one cannot say the error margin is specifically this without referring to the particular estimate that is contained in the paper.

Q. You say there was a cross section, I believe you said that concerning this so-called poll that you laid out?

Mr. Grimes: There is no such testimony.

The Court: He is being asked if he did say it.

Mr. Grimes: That is not as I understood the question. That is what he said there was not. We have a question assuming a state of facts contrary to what the witness said and I object on that ground.

The Court: The subject is not an ordinary one.

Mr. Grimes: That is true.

The Court: The attorney is thrown into this without preparation, and the study that may have been afforded to your side of the case, and the Court must make very generous allowances for his development of the point which he is called upon to make while he is standing on his feet as witnesses come one after another, and it is with that in mind that I make the rulings which I make.

Mr. Grimes: I understand, and I have the greatest sympathy, and no object to surprise, but at this point he does [fol. 331] say he has knowledge of polls greater than mine. I just do press the objection, assuming a state of facts contrary to the evidence as though the evidence had been stated that way, and that is the only basis of my objection. I do not object captiously. I am quite liberal in that but—

The Court: The differentiation of these witnesses with that activity are minute and the slightest transposing of expressions they imply makes a big difference to them, so the Court is allowing the Attorney General wide latitude in the conduct of this cross examination, so proceed.

Q. You did take a cross section, did you, of Nassau County as to pursuit, that is vocation and profession, did you?

A. No, I did not.

Q. The only cross section you took was, and which could be in contrast are those in incorporated communities and those in unincorporated communities, am I correct in making that statement?

A. No, I don't think the only cross section.

Q. Tell me what other cross section you took.

A. As probably has been covered before a sample was laid out, the sample in which we developed 60 clusters.

The Court: You asked him in what way was any cross section developed, to state it. You state that in your own language.

The Witness: The cross section idea, I presume you mean [fol. 332] by stratified, which existed in this survey, was stratified for the selection of blocks, not for the selection of individuals within blocks. In stratifying the blocks we made sure by our method of selection that they came in proper proportion in large towns, medium sized towns and small towns which was brought out in the evidence regarding the array of towns from large to small. In addition there was geographic strata assured first by selecting both the clusters which fall in towns as well as those in open country from each of the three townships in proportion to the population and within the sampling, within each of the three townships for the unincorporated area, the numbering of the blocks assigning them to block cities Miss Barnes described in her testimony was such as to assure us the blocks would fall roughly over the entire geographic spread of the count, and the stratification was confined to that strip in the selection which concerned itself with selecting of blocks, having selected blocks, selection of individuals became a matter of probability but there was no further cross section if that is what you mean by that involved.

Q. Having used the word stratified so many times, would you say this poll as you term the Hofstra poll to be a stratified poll?

A. Stratified poll? I don't understand.

Q. I ask, yes or no? You are an expert on polls.

A. Yes.

[fol. 333] By the Court:

Q. Was it? Yes or no, if you can answer.

A. I cannot answer that yes or no.

By Mr. Rollins:

Q. Was it a poll at random?

A. That cannot be answered yes or no.

Q. There are only two kinds of polls, a stratified poll and a random poll.

A. When you say poll, you mean sample?

Q. Yes, sample.

A. There are many different types of samples. They by no means exhaust the field.

Q. You mean there are many more——

The Court: When you say poll, he does not join in the terminology.

Q. You have heard the term, poll?

A. Yes, I have.

Q. The title of this very project is called the Hofstra poll?

A. Not to my knowledge.

Q. What is it called? May I have Exhibit G?

The Court: Do you know what it is called?

The Witness: I have heard it referred to as the Hofstra study, Hofstra survey.

By Mr. Rollins:

Q. Are there more than two classifications, namely random sample poll or stratified sample poll?

A. Indeed there are. There are many more.

[fol. 334] Q. Give me the others.

A. They are cluster sample, cluster samples, there are stratified random samples, there are also multiple stage, single stage and sample stage operation; there are variations of—called systematic samples, and there are combinations of these things I have given before such as stratified cluster sample with random selection within the clusters, so on.

Q. You mean these are all titles of the subject you are trying to convey to me, or sub-titles?

Mr. Grimes: I object to that.

The Court: They are in answer to your question. Name what other kinds of samples there are besides random and stratified.

Mr. Grimes: Have you finished the answer?

The Witness: Yes.

Q. Am I correct in stating that in taking a random poll, you stand on the corner of 42nd Street and Broadway and ask anybody comes along what his opinion is or preferences are on a particular subject; is that what you call random?

A. No, that is not what I would call a random poll at all.

Q. What would you call that?

A. I would call that a quota sample or at least, let me put it this way: it does not begin to meet the requirements of a random sample in any sense.

Q. Did you do anything different in such a poll by picking them out from the sky?

A. I did not pick any from the sky.

Q. There was a picture taken, aerial picture?

A. Yes.

[fol. 335] Q. You did not know who lived there, did you?

A. No.

Q. You just by making these clusters, you picked it from buildings, you just picked buildings, did you not?

A. No, I did not pick buildings.

Q. Somebody in your company did.

A. No. We picked areas of land.

Q. On that land you picked also structures that you were counting?

A. No, not from the photograph.

Q. You mean you did not start off with a photograph and pick off any clusters?

A. We picked clusters, areas of land, they were picked with probability assigned to them in proportion to the kind of dwelling units or estimates of dwelling units based on photographic count. Finally, got one of these areas in the sample, then I think it must have been covered or they were pre-listed by having an interviewer visit the cluster and list every dwelling unit in that cluster, adhering to the boundaries as designed from the aerial photograph.

Q. A person's knowledge of any particular subject is governed by experience or education, isn't that right?

A. Yes.

Q. Do you know of any other method?

A. Not off hand.

Q. When your pollsters went to make interviews were they told to find out the experience or education of those interviewed?

A. Can I testify as to what instructions were to interviewers?

Q. Do you know whether or not any of those question-

naires given these interviewers contained any such questions?

A. No, I don't even remember that point.

[fol. 336] Q. Would you say there were none?

A. Cannot say, I don't know.

Q. Yet you were to consult them on this enterprise.

A. On this sample.

Q. You did not think that was necessary at all?

A. Not for doing a sample, no, indeed.

Q. Could you tell merely by picking a structure or dwelling the education, what the experience of its occupants?

A. No.

Q. Is it not a matter of common knowledge that a person, any person who opens a bank account are only those who have money to do so?

A. Naturally.

Q. You did not think it was necessary to interview as to what the income was or as to any surplus left over?

A. No, I did not think it necessary at all.

Q. That was not necessary to determine whether or not you were questioning persons who were likely to have such?

A. Was it not necessary? Is that your question?

Q. You did not think it necessary?

A. No, I did not think it necessary.

Q. In asking a person's faith by a sample poll or taste if you like, champagne, you would not go to a beer drinker?

A. No, I would not.

Q. You would go to people who have a taste for champagne, would you not?

A. Yes.

Q. You testified that you did not, in constructing the sample, take into consideration the economic strata if any, in which the people lived, is that correct?

A. That is correct.

Q. Did you have a purpose in mind in making that sample without any such economic strata?

A. Yes, I did.

[fol. 337] By Mr. Grimes:

Q. Will you state fully what that purpose was, and what advantages or disadvantages that method of eliminating economics had?

A. To begin with, we decided this should be a probability sample, which meant we must be able to state the probability which each individual in the county had of coming into the sample. Having once set our plan to draw a probability sample, then setting up a procedure which we have heard described for achieving that, it not only became unnecessary but extremely difficult demonstratively to even handle a matter such as distinguishing between rich and poor, for that is at best a subjective estimate and you cannot tell as these things fall in the sample which we use which would turn up in any given spot. We felt certain in the sense that anyone does in flipping coins or using any other random process that by taking 928 such households with known probability under the design described they must turn out to be so many rich, so many poor and the approximate proportion in population just as any other case as drawing chips from a bowl.

Q. In other words, the question of economic stratification was taken care of automatically by the random type?

A. Yes, indeed so, as if you draw cards from a deck. It was not subjective in other words, it did not depend on someone's opinion as to the economic level at which any family may live as it did from appearance or anything else, it only depends on random laws of probability, or random chance.

Q. As I understand your testimony you say when you do take a stratified type of poll where the stratification is [fol. 338] economic, that involves somebody's opinion or judgment?

A. It is almost inevitable that has to get into it. I do not see how you can do it otherwise. I do not see how it could be achieved without bias which might be serious in a thing of this sort.

Q. And the type of sample you designed here is one which eliminated that possible bias?

A. Yes, it did.

Q. Was unbiased?

A. Means these things have to come out in approximate proportion.

Q. You were asked about the instructions given to inter-

viewers. Will you please state what those were in connection with the sample?

A. In connection with the sample the plan called for interviewers—well, first the interviewers pre-listed the block which meant that having the boundaries of the cluster block or cluster which may have been more than one or more blocks described the cluster following the boundaries of the area lying within those boundaries the interviewers pre-listed or were instructed to do so all dwelling units.

Q. We have had testimony on that?

A. Yes.

Q. My question related to the instructions to interviewers in relation to the subject matter which the Attorney General inquired about and I am simply asking you about the instructions to interviewers you gave.

A. I thought this question related to instructions concerning the interview which I did not participate in, therefore, I could not answer.

Q. How would you describe the Hofstra survey? What type survey was that?

A. It was a probability sample. That would be a designation which has grown to distinguish it from samples of the [fol. 339] sort which I understood the Attorney General to refer to, in which they use a more purposeful selection or subjective choice of the respondents to conform to the interviewer's idea.

Q. That is an economic stratification type?

A. Economic stratification type, or so many old, so many young, so many rich and so many poor, that type of thing is usually done in what is known as a quota sample in market research.

Q. Which type of sample in your opinion is more accurate, the quota sample opinion or probability type of sample, as applied to a problem such as ascertaining the knowledge or lack of knowledge of certain terms of people in a particular community such as a county like Nassau County? Which in your opinion is the more accurate type of survey?

A. I feel quite strongly the probability sample is more accurate, much more so.

Q. Than the quota type?

A. Yes.

Q. Can you state the reason, briefly?

A. Yes, I think so.

Q. Please do so.

A. Quota samples inevitably possess bias. One bias arises out of the fact that interviewers exercise judgment in the selection of households, and they may be motivated by thoughts of convenience or they would like to talk to this type of person or the other, things which are not rigidly controlled. In this operation none of that was left to anyone's subjective judgment at any point on the way. The designation of respondents from beginning to end was all done on an automatic process involving random numbers which completely took away any subjective element which can be the cause of bias.

Q. Go ahead. Are there other?

A. Yes.

[fol. 340] The Court: I think that is a complete answer to that question, is it not?

The Witness: There is at least one other.

Q. You said the probability sample eliminated the subjective?

A. Judgment.

Q. Possibility of error in judgment?

A. Yes.

Q. You must decide in advance what economic stratification you go for, is that correct?

A. Yes, and the interviewer's designation of those respondents.

The Court: We have that point. You gave that to us first. You said that the quota allowed the interviewer to select. This other method permits no selection.

The Witness: The other method is completely objective, and is therefore analogous to the type of poll selection which is well shuffled when you select. One objection to the quota method as I see it lies in the fact, one other objection, lies in the fact that to assign quotas to interviewers for example, so many rich, so many poor, you must know in advance how many rich and how many poor there are in your population and if you did not have that knowledge accurately quotas you assign would show in wrong proportion.

By the Court:

Q. So that you could set up a ratio?

A. Yes.

The Court: I think we understand that.

[fol. 341] By Mr. Rollins:

Q. There is an error margin in the method used by you?

A. Yes.

Q. What is the percentage? That is what I want to find out.

The Court: He says you could not give an over-all percentage unless you asked for it in a special division.

Mr. Rollins: Throughout all of Nassau County.

The Court: You would have to ask for it in a special activity.

The Witness: Yes, each estimate in the report has a special margin of error. It will not be the same for any two estimates in the survey.

By the Court:

Q. Did you not say you could not give any over-all margin of error?

A. Yes.

By Mr. Rollins:

Q. Give me the Glen Cove. What is the margin of error on Glen Cove?

The Court: No. You do not understand, unless I do not understand it. He cannot give an over-all margin of error. You would have to ask him what his margin of error on the setting up of clusters or of setting up of various dwellings. I want to ask him if that is correct.

[fol. 342] The Witness: No. I mean for every estimate, separate estimate in the report, for example if you ask this question there will be a margin of error attached to it. If you discover in your survey so many of your responses have this characteristic and so many the other characteristics, each of these would have a separate error margin, it would

not be the same for two different characteristics. That we measure by the survey. You see, if you had asked only one thing.

Q. The maximum possible aggregate error?

Mr. Grimes: I object to this question as meaningless.

The Court: I do not understand that last answer. I understood you to say, No. 1, let me see if we have this right, that you did not feel in a position to give a margin of over-all error on this survey, is that correct?

The Witness: Yes. I even state that is impossible.

By the Court:

Q. I want to ask you this. Can you approximate the over-all margin of error on this survey?

A. I think it might clarify the whole matter if we say each estimate has an error margin.

By Mr. Grimes:

Q. When you say estimate——

[fol. 343] By the Court:

Q. That is a new term we have here now, the word, estimate.

A. In other words, estimate has a margin of error. The sample does not.

Q. Mr. Grimes says what do you mean by the word, estimate, there?

A. If, for example you ask how many of the people were employed, I don't know whether that question is there or not, you will say so many say yes, so many say no, then they are estimating the noes in that case, taking the same estimate, but then you may also ask, how many.

Q. You can stop there. Then what I understand you to mean, and perhaps it is understood in this assumption, if you call it that, that the margin of error is not in the formulation of the plan, but it is in the answers to the interviewers, if there is a margin of error? That is where you would find it, is that right?

A. No, I would not say that. The error margin for any characteristic you set out to measure will depend on your sample design.

Q. Will you keep this in mind. We know what the characteristics of yours is.

A. But there is more than one, and each has a separate error margin, therefore I cannot give an over-all answer.

Q. The margin of error which you have in mind is one that turns up when you finally get the answer or answers.

A. Yes, to any particular question.

Q. Yes, to a particular question, but it is not before those answers come in? That is where you get the word, estimate, [fol. 344] into your testimony, is it not?

A. Yes.

Q. I want to eliminate a misunderstanding I have. I think it has been done, but I am not sure of it. When counsel was questioning you about margin of error, and you were making answers to the effect that there is such a thing as a margin of error in this development, you referred to certain estimates?

A. Yes.

Q. And you were not then referring, were you, to the divisions of the plan, of the survey in its original setup?

A. Oh, no, no. I am referring to any particular characteristic we find by asking respondents questions.

The Court: The margin of error in his judgment generates from the answers to the questions.

By Mr. Rollins:

Q. When you say estimates, what do you mean in terminology of surveys, statistical surveys?

A. Well, for example, if you had asked everyone how much income he earned, on the basis of this sample we get an estimate of average income. That would be an estimate. If you asked them how many have a bank account then we can estimate from the sample. That would be another estimate and for each such estimate a survey turned up the margin will be different, it will not be the same for each margin that comes up.

Q. If you ascertained approximately 85, 90 percent, of the people, this is hypothetical at this stage due to the meaning of the word, savings, and only ten percent knew [fol. 345] what thrift account was, would there be a margin of error for 90 percent or ten percent?

A. Yes. In that case there would be a different margin of error for the two.

Q. In other words, margin of error is to some extent a function of statistical percentage?

A. To some extent, yes.

By Mr. Rollins:

Q. The subject of sample deals with the over-all subject called statistics.

A. Yes.

Q. It is not a subject of psychology, is it?

A. No.

Q. Statistics as applied to samples is not called an exact science? Is not that one of the principal statements made in the subject by authority?

A. There I think I would have to distinguish sample as a science as applied to anything.

Q. Exact science. You mean what you discovered was exact science, results obtained by you in this particular poll is exact?

Mr. Grimes: I object. A matter of judicial knowledge, there is no such thing as an exact science.

The Court: I allow it. This goes to the authenticity of the survey.

The Witness: The question as I heard it, what I discovered was an exact science? No, but we practice there science and the word, exact, is subject to objection we make about science, the result obtained is not exact and perfect, could not be, no.

[fol. 346] Q. What is the margin of error as to the results obtained, if it is possible of mathematical calculation?

A. Yes, it is.

Q. I would like to know how much.

A. It is possible of mathematical calculation, but it will be different for each estimate. How can I answer?

Q. Did you make a calculation in this survey?

A. Yes, I can.

Q. What was the mathematical calculation?

A. You said did I make one. Beg pardon. I thought you said, could I. No, I have not.

Q. Would it take you long to make that determination?

A. For a particular estimate, I don't think it would take an awful long time.

Q. Have you any approximate idea? Would it be approximately 25 percent? I am talking about your results, your answers.

A. Which result; which answers?

Q. I am interested in your opinion.

The Court: This witness said he could only give a margin of error if you give him a particular estimate. If you are talking about an over-all he cannot give.

By the Court:

Q. Can you give a margin of error on any estimate in this study and select your own estimate?

A. Yes, I am prepared to say that the error — margin may be computed for any estimate in this report. I have not yet computed any.

By Mr. Rollins:

Q. After that computation could an opinion be expressed?

A. Yes, an opinion could be expressed, of course.

[fol. 347] Q. Would an opinion based on that be accurate?

A. Yes, it would be fairly accurate.

Q. When you say fairly you mean there would be, that would take into account the margin of error we are talking about?

A. Yes.

Q. Since you said it would be fairly accurate, could you give us an approximate percentage of error?

A. On any estimate I would give one.

Q. Please take any part of that 928 sample ballots as is said to have been taken in this particular survey and show us hypothetically what margin of error could be obtained in this particular poll.

The Court: Take whatever estimate you want to answer that question.

The Witness: I have no estimate in front of me. I do not know it exists. How can I answer such a question?

By Mr. Rollins :

Q. The Gallup poll, you are acquainted with that?

A. Yes.

Q. Fairly accurate poll? Professor Gallup? It is a nationally known poll?

A. Yes, I know of it.

Q. Enjoyed an excellent reputation?

A. Some places, some people.

Q. In your opinion, it is not good, is that right?

A. It is not comparable to this job in any sense.

Q. You believe it is better?

A. I believe it is worse.

Q. The only reason on which you predicate your statement is in the last Presidential election it guessed wrong?

A. No. I said that long before election, on which I won money betting against it.

[fol. 348] Q. A newspaper called the News?

A. Daily News, New York.

Q. Don't they enjoy a reputation as pollsters?

The Court: This is important to you that this poll is accurate, because if the Court uses it, its accuracy becomes of the greatest importance, but I want you to restrict your examination, if you can.

Q. Do you know what is meant by a special interest account, compound interest account and thrift account?

A. Vaguely.

Q. Did you study economics?

A. Yes.

Q. Was banking a subject of economics?

A. Yes, money and banking.

Q. Was not one of the subjects you were taught about, the difference between commercial bank and savings bank in your subject?

A. I knew there were two kinds, yes.

Q. You heard the terms, time deposit, demand deposits, in your study?

A. As I remember, yes.

Q. A time deposit bears interest in the nature of a savings account?

A. I suppose so, yes.

Q. High schools of the City of New York, elsewhere in the State, economics is in their curricula?

A. Usually it is not a high school subject.

Q. You mean economics is not taught in high school?

A. Not most places.

Q. Taught in New York high schools?

A. No, not where I went to high school.

Q. Do you know of anywhere it had been taught?

A. Yes, I know of one.

Q. You do not intend to convey the result you obtained in Nassau County, it is fair to tell us the same condition [fol. 349] exists in the rest of the State, the other 61 counties?

A. No.

Q. Your survey only reflects Nassau County?

A. That is true, it reflects Nassau County.

HOPE BUTT, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 10 Meristone Terrace, Bronxville, New York.

Q. You are married, are you?

A. Yes, I am.

Q. You have children?

A. Yes, I do.

Q. You work for the Psychological Corporation?

A. Yes, I do.

Q. Where is that located?

A. 522 Fifth Avenue, New York City.

Q. What sort of work do you do?

A. I do various types of interviewing for them, surveys, copy tests and advertising tests, a beverage.

Q. How long have you been doing that type work?

A. Around four or five months.

Q. Did you participate in the Hofstra survey of certain banking terms, knowledge of banking terms?

A. Yes, I did.

Q. In what capacity?

A. As an interviewer.

Q. I believed you served in some other capacities, too?

A. Yes.

Q. We will confine our questions to interviews. Prior to working on the Hofstra, how many other surveys had you worked on before?

A. I do not exactly remember, I imagine probably 15 or 20 for the Psychological Corporation.

[fol. 350] Q. In connection with your work on the Hofstra survey did you receive instructions to do something?

A. Yes, I did.

Q. Whom did you receive those from?

A. Dr. Chappell.

Q. What were your instructions?

A. They were to follow instructions exactly, that I must only take a person designated on that line, that if I took anyone else, if for instance, I took a man instead of a woman I would ruin the whole survey, he was very specific about I must follow them absolutely, and I did three pre-tests for him before, or pre-interviews I believe you call them, before I went out to survey, and there were more, too, but those were the most exacting and I brought them back and Dr. Chappell went over them.

Q. I show you about a pound of documents and ask you to look them over and then state what those are, state what the documents are.

A. They are interviews completed by me for the Psychological workshop of Hofstra College.

By the Court:

Q. Your notes?

A. Those are my handwriting, my signature.

By Mr. Grimes:

Q. Does that contain two types of documents in large number, first instruction sheet, secondly, notes of interviews?

A. Yes, it does.

Q. Would you look through and state whether those are all in your handwriting?

A. Yes, those are mine.
 [fol. 351] Q. What instructions did you receive from Dr. Chappell prior to making the interviews?

The Court: Except as you have already said. Anything further?

The Witness: Well, we must take of course, exact houses, we must ask questions just as they were worded, we must say nothing to the respondent at all except to take down what he said to us.

Q. In other words, you were to ask questions just as they appeared in these documents?

A. To be very careful to read them just as they were, yes.

By the Court:

Q. What record were you to make?

A. Record just exactly what they said and put it down verbatim.

By Mr. Grines:

Q. The instructions given you were clear, were they?

A. They were very clear.

Q. Did you make accurate notes of what people answered to the questions given?

A. Yes, I did.

Q. Wrote them down?

A. Yes.

Q. These appear in your own handwriting?

A. Yes.

Q. You followed instructions as they appear here, asked questions as they appear?

A. Yes, I did.

Q. Can you remember yourself, every answer given by every person you interviewed, every question?

[fol. 352] A. No, I cannot. In fact I was just as confused—no, I cannot remember.

Q. You notice these questions deal with four terms used in banking, is that correct?

A. Yes, I do.

Q. As of the time you took an interview and up to the completion of handing in to Hofstra College the last of

these questionnaire sheets, did you then know at that time what a savings account was?

A. No.

Q. Did you have some idea what a savings account was?

A. Yes, I knew what a savings account was.

Q. As of that time did you know what a thrift account was?

A. No, I did not. I am a banker's daughter. My mother did not either. I asked her.

Q. You will have to leave your mother out.

A. All right.

Q. As of that time did you know what a compound interest account was?

A. I had one, but I did not know what it was.

The Court: Does it matter what she knew personally?

The Witness: I really did not know what it was.

Q. Did you know what a special interest account was?

A. No, I did not.

Q. You said you were a banker's daughter?

A. Yes. My father was a banker.

Q. What position did he occupy?

A. He was senior vice-president.

[fol. 353] The Court: I am going to exclude that, because I do not want to open the door to cross about that.

Mr. Grimes: I offer these questionnaires in evidence.

Mr. Rollins: We come to the crux of this particular case. I object to the statements therein recorded on the ground they are hearsay in violation of the hearsay rule.

The Court: I will overrule the objection. Do you have some compilation of that batch of papers that you could provide Mr. Rollins with so that—

Mr. Rollins: I am not going to question, I am going to stipulate to shorten this trial. The State feels this evidence is incompetent on the ground of the hearsay rule, and to shorten the length of this trial because we feel it has no relevancy. It does not serve as expert testimony, no good but to delay this trial unduly without necessity. I am willing to stipulate to curtail this trial that the balance of

The Court: Why do we not do it this way? Your position

is very constructive. How many more witnesses of this nature did you have in mind calling?

Mr. Grimes: There are 43 others and 43 other batches of documents like that which comprise all of the answers to all the questions asked.

The Court: Do you say, with your knowledge and study of this case their testimony would be substantially the same [fol. 354] as Mrs. Butts'?

Mr. Grimes: I do, sir.

The Court: And the exhibits which you have just offered in evidence, would they be, would they have been developed in substantially the same way Mrs. Butts developed those?

Mr. Grimes: Yes, I would, exactly the same way except different persons were asked by exactly the same method.

The Court: I think on that premise—

Mr. Rollins: I would also like to have a stipulation that this witness and other persons whose testimony we stipulated with the reservation I just made, subject to my objection to its competency, are not employed or licensed as private detectives.

Mr. Grimes: Oh, yes, yes, indeed.

Mr. Rollins: That each of them received payment for their services in gathering—

Mr. Grimes: Yes. This was a professional job.

The Court: They were paid and the money was provided by the defendant. What source it went through—

Mr. Grimes: I believe he testified they were paid by Hofstra.

The Court: We will not go into that. The evidence here is undisputed the defendant provided the money for which the mechanics of putting it in the hands of workers is quite unimportant. Any other stipulation? Will you stipulate these other 23 would testify substantially in the same way [fol. 355] that Mrs. Butts has testified, that the documents which she developed would be substantially the same as these others except for the people interviewed and the answers made, not admitting the correctness of the testimony, accuracy of the recordings, or the truth of the testimony, likewise reserving your right to object to the materiality and relevancy as well as the competency of these exhibits and testimony?

Mr. Rollins: Except the testimony of the banker's daughter—

r, they did not know what special interest account and compound interest and thrift account meant.

The Court: We will except that. Other witnesses have given that testimony naturally.

Mr. Grimes: It would be substantially the same, yes.

The Court: Counsel is devoting his attention to the fact his lady is the daughter of a banker.

Mr. Grimes: I don't believe—there are no other bankers' daughters. But they will testify up to that time, most will testify they knew what the word savings meant.

The Court: Just as she did with respect to those terms.

Mr. Grimes: Yes.

The Court: Have you any objection to that being included in this stipulation? You heard her testimony with respect to the terms about which the interviewers were conducted?

[fol. 356] Mr. Rollins: I stipulate they did not know.

The Court: Their answers would be substantially the same as hers.

Mr. Rollins: Dealing only with the matter of gathering the poll, but not about savings.

The Court: Mr. Rollins does not want to stipulate what these people's personal experience might have been. I think that ought to be eliminated myself.

Mr. Grimes: 24 are from New York City like Mrs. Butts, two from Queens and 18 from Nassau County. I had intended to develop that line of questioning especially from those who live in Nassau County.

The Court: Under objection I exclude their personal experience. I am taking this on the general heading of the survey because I cannot take personal experiences because that would open the door to the Attorney General to call numerous witnesses to give their personal understanding of the meaning of those terms, and I do not want to get into that, so, Mr. Rollins, the Court will accept your stipulation with that eliminated.

Mr. Grimes: I would like to ask a few more questions.

By Mr. Grimes:

Q. Did you influence, or attempt to influence in any way, manner, answers given by persons you questioned?

A. No, I did not. I might say I have had training in interviewing.

[fol. 357] The Court: No. Just leave it that way.

The Witness: No, I did not.

Q. At the time you asked these questions did you know the purpose to which the answers to these questions were to be put?

A. I did not until the very end of the survey when one man I was interviewing said he understood——

The Court: One moment. To the very end of the survey?

The Witness: Yes.

Q. Have you handed in all but one?

A. Either my last or next to last cluster that I did.

Coloquy between Court and Counsel

Mr. Grimes: We will enter into a stipulation.

The Court: The stipulation is for your benefit.

Mr. Rollins: I am not accepting the last part of the statement. That I could not stipulate.

The Court: I do not think that is important, but I want to eliminate that question of personal experience, so it will not bother us in this case. If you will move to strike out the answers made by this lady to her personal understanding of the meaning of those terms, I will grant the motion.

Mr. Rollins: I will move the statement made by the witness concerning her personal experience, knowledge, as to the three terms, special interest, compound interest account, and thrift account be stricken from the record.

[fol. 358] The Court: I think it is a safe thing to do, to strike that out, because if I let that stand the Attorney General must be allowed to call witnesses here to testify as to what they understand those terms to mean.

Mr. Grimes: I would like to note my exception.

The Court: I am granting your motion, and exception. We have your stipulation with the testimony as emasculated, as it is now.

Mr. Rollins: Yes. Also that this stipulation covers 928 samples testified to by——

The Court: Yes, covers every interview made.

Mr. Rollins: I do not stipulate there were 928 samples.

The Court: No, you do not stipulate as to the accuracy of anything, just the others will say that. It would be in order for you to put in evidence other interviews.

Mr. Grimes: Yes. We would like them marked.

The Court: Could someone attend to that while you go on with this? I would like to finish this part of the case this evening.

Mr. Grimes: Perhaps we could enter into some other stipulation then we can let these witnesses go.

The Court: Before you get into that I think it would be the proper thing for us to do, if you have some compilation of these interviews, I think the Attorney General should be [fol. 359] supplied with that so that his work would be easier.

Mr. Grimes: Yes. We will be very happy to do that. As a matter of fact I planned to offer the survey in evidence on the theory it was merely a compilation of what has been testified to, together with an explanation which is also in digest form, of what has been testified to by the Professor.

Mr. Rollins: Do I understand the balance of these questionnaires, they have been offered?

The Court: Yes, they are all offered in evidence, subject to your objection.

Mr. Rollins: On the ground they are incompetent, irrelevant, immaterial and specifically upon the ground it is hearsay.

Mr. Grimes: May I at this time—

The Court: Why not mark this one exhibit T.

Mr. Grimes: It was testified there were prelisters whose job was to go out and make sure the aerial photograph was right.

The Court: Yes, that there was no change in condition.

Mr. Grimes: That there was no change in condition, and there were 19 of those persons. We have at least some of them here and can produce the rest. I do think that would be an appropriate subject for stipulation.

The Court: State the stipulation, and see how Mr. Rollins reacts to it.

Mr. Grimes: I think if I could call one witness we could get on faster.

[fol. 360] WALTER OHNMACHT, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 131 North Seventh Street, Lindenhurst, New York.

Q. What is your occupation?

A. I am a student, Hofstra College.

Q. You have some other type of job?

A. Yes, I have.

Q. What is that?

A. I am a bonded deputy sheriff, County of Suffolk.

Q. Did you work on the Hofstra survey?

A. I did.

Q. Did you work specifically as a pre-lister?

A. No.

Q. Did you do pre-listing work?

A. Yes, I did.

Q. You did work other than pre-listing also?

A. I did.

Q. And you were an interviewer?

A. Yes.

Q. Were you a tabulator?

A. Yes.

Q. And a coder?

A. Yes.

Q. I show you a document which is No. 29 and ask you to state without reading into the record, what that is, please.

A. It is a map showing cluster number 53, which is in Massapequa.

Q. What did you do with reference to that document which you have in your hand?

A. When I received it I was given instructions.

Q. By whom?

A. By Dr. Chappell.

Q. To do what?

A. To start at the area marked start, and proceed according to arrows and list all dwelling units in that area.

[fol. 361] Q. Cluster 53?

A. That is right.

Q. Did you follow instructions?

A. I did.

Q. Make a list?

A. I did.

Q. Are they in your handwriting?

A. They are.

Q. Were they an accurate list of the dwelling units you found in the area?

A. Yes.

Q. What did you do after you had completed that list, turn them in?

A. I returned them to Dr. Chappell.

Mr. Grimes: I offer this is evidence.

Mr. Rollins: Objected to on the ground it is incompetent, irrelevant and immaterial.

The Court: I will receive it.

(Paper received in evidence and marked Defendant's Exhibit U.)

Q. That operation was known as pre-listing?

A. That is correct.

Q. Would you describe briefly to the Court what you did in connection with that? Make it very brief, please.

A. Surely. I started at a point marked start, and I went to that point and I started listing the dwelling units around the block.

Q. Making any appropriate notation?

A. That is right.

Q. You continued the process?

A. That is right, all the way around.

Cross-examination.

By Mr. Rollins:

Q. When you say you are a deputy sheriff, you do not say you are on the public payroll?

[fol. 362] A. Occasionally, yes. I am not a steady deputy, but I do get paid when I work.

Q. You mean you are on a temporary job.

A. That is right.

Q. It is not honorary?

A. No, no. I get paid.

Q. Since when have you been a deputy sheriff?

A. Approximately two years.

Q. You are called on special jobs to assist the Sheriff?

A. I am attached to the District Attorney's office.

Q. You get paid on a per day basis?

A. Per day basis.

Q. You are not a licensed private detective, are you?

A. I am not.

Q. You were not employed on this survey by a licensed private detective, were you?

A. No.

Q. You got paid for your job? Got paid for it?

A. Yes.

The Court: We have that in the record already. You cannot have it any better than I stated it.

Mr. Rollins: I move to strike out the witness's testimony upon the ground it is incompetent, irrelevant, immaterial, and upon the further ground his part in formulating the so-called Hofstra poll or sample was in violation of the provisions of Article 7 of the General Business Law.

The Court: Denied.

Mr. Rollins: Exception.

Mr. Grimes: We have 18 other such witnesses. I suggest a stipulation they would testify in substantially similar manner except for position. They followed instructions—

[fol. 363] The Court: Do not enumerate. Substantially as the witness?

Mr. Grimes: Substantially as the witness testified.

Mr. Rollins: I make such stipulation without admitting the truth or accuracy of the testimony, and also subject to my objection that the testimony, evidence thereby adduced is incompetent, irrelevant and immaterial; upon the further ground that acts testified to by this witness whose testimony I now stipulate tends to establish they have gathered evidence contrary to Article 7 of the General Business Law.

The Court: All right. With the stipulation before the Court you can eliminate that.

Mr. Grimes: I wish to offer in evidence all the other of these sheets.

The Court: Subject to the Attorney General. Did you offer that one?

Mr. Grimes: Yes, this is in evidence.

The Court: Subject, then, to the Attorney General's objection? That he stated with respect to other exhibits on polls these will be received in evidence and marked Exhibit U. Count them.

Mr. Grimes: These cover all 60 clusters.

The Court: That these exhibits cover all 60 clusters. Will you stipulate all persons who counted dots if called, would testify they counted the dots accurately and reported to the supervisor of the Hofstra poll an accurate count of dots.

Mr. Rollins: I will not stipulate that as a fact, but will [fol. 364] stipulate and do stipulate that if called as witnesses they would say that they counted the clusters in each instance accurately, subject to my objection such testimony is incompetent, irrelevant and immaterial.

The Court: I overrule the objection. That concludes that proof?

Mr. Grimes: Yes.

The Court: So you will not have any error we can adjourn at this time and you can pick that up tomorrow.

Mr. Grimes: We have produced in court the balance of the aerial photograph, of which these represent five sections.

The Court: I do not see what difference it makes. Do you want to put them in evidence, too?

Mr. Grimes: I would like to ask whether the Attorney General in regard to aerial photographs in using the word, competence in any way challenges their authenticity.

Mr. Rollins: No. I say I will stipulate as a fact such was taken.

Mr. Grimes: That it is accurate?

Mr. Rollins: That it is accurate.

Mr. Grimes: I wanted to clarify that. I think that concludes this phase of the case. We will call Professor Brumbaugh.

The Court: I think it is an appropriate time to recess. Adjourned to tomorrow.

[fol. 365]

Mineola, New York, January 31, 1951.

TRIAL CONTINUED

Mr. Rollins: Is it possible for me to put Mr. Ludemann on the stand?

The Court: What additional proof have you to offer?

Mr. Grimes: Completion of the Hofstra poll now, which we have the documents in evidence will consist largely of a tabulator who will testify the results were accurately tabulated under his supervision, three witnesses, one to express his opinion as to the accuracy of the poll, plus Mr. Simmons, who will be recalled to examine the possibility of the margin of error in this type of poll, and the degrees to which they occur; the margin there will not exceed a certain amount either way, specifically on this type of poll, why this was selected.

The Court: That will treat with the poll?

Mr. Grimes: That will treat with the poll. I propose to call three bank officers to testify on the interior arrangement of the bank.

The Court: Now I will hear your application.

Mr. Rollins: Mr. Ludemann has been serving for many years in the State Banking Department and is well versed by education and experience to give the purposes and functioning and banking patterns of the State of New York from [fol. 366] its inception. I intend to prove through him various phases thereof, also the policy of the department, and their interpretation of the statute as to what constitutes the word, equivalent of the word, savings, savings, their practices and rulings, and to establish that various terms like thrift account, special interest account and compound interest accounts—

The Court: I do not want the details. You want this gentleman, who is familiar with this subject, to testify out of order?

Mr. Rollins: Yes. He is an executive of the State Department, and one of the chief deputies of the Superintendent of Banks of the State of New York.

Mr. Grimes: I have no objection whatsoever to his being called out of order. I understand he is being called in rebuttal?

The Court: Yes.

Mr. Grimes: I might have an objection on that ground.

The Court: You are not waiving any objection. You are just giving your consent he be called out of order.

Mr. Grimes: To that I have no objection.

FRANCIS J. LUDEMANN, called as a witness in rebuttal, in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rollins:

Q. Where do you reside?

A. 236 Abingdon Road, Kew Gardens, Long Island.

[fol. 367] Mr. Grimes: I request that the stenographer take all colloquies, especially any question that may be addressed by the Court to the witness. I do not believe that has been the practice, but I believe it will be important.

The Court: All right. I would like to confer with counsel a minute. I am devoting the rest of the week and as much more time as needed to complete this law suit.

Q. Mr. Ludemann, have you an official connection with the Banking Department of the State of New York?

A. I am Deputy Superintendent of Banks in the Banking Department of the State of New York.

Q. Where are you stationed?

A. New York City.

Q. How long have you been a Deputy Superintendent of Banks of the State of New York?

A. For just short of fourteen years.

Q. Have you been connected with the State Banking Department of New York in any other capacity?

A. I have been connected for a total period of approximately twenty-one years. An earlier period I was there in the capacity of Bank Examiner.

Q. Have you held other positions outside of Bank Examiner and Deputy Superintendent of Banks?

A. Within the Banking Department?

Q. Yes.

A. No, although as Bank Examiner some of my time was spent in the field of examination of institutions, about three years, and about four years in the office assisting deputies [fol. 368] at that time in the supervision of some miscellaneous types of institutions we have, such as credit unions, investment companies and private bankers.

Q. Are you in the competitive Civil Service class of the State of New York?

A. Yes, I am in the competitive Civil Service.

Q. Have you had any education, academic education in the field of economics?

A. I am a graduate of N. Y. U., school of accounts, with a B. C. S. degree. I am also a graduate of the American Institute of Banking, of their banking course.

Mr. Grimes: We will concede his qualifications.

Q. Have you any other academic training or learning?

A. I hold a certificate to practice as a certified public accountant in the State of New York.

Q. How long have you been so licensed by the State of New York?

A. For about ten years.

Q. Have you been employed in a bank in your lifetime?

A. Yes. Prior to my going with the Banking Department I was employed for about eleven years in a small commercial bank in Brooklyn, Hamilton Trust Company, which later merged into and became a branch office of Chase National Bank.

Q. Did you work for Chase National Bank?

A. I worked for Chase National Bank, I figure about five or six of those years. It was in the capacity or status of a branch of Chase.

Q. What were your duties?

A. I ran the gamut of all functions, going in as a runner [fol. 369] working on the filing of checks, on individual ledgers; I worked in the rack department, receiving teller and paying teller, and concluded, I was in the trust department at the time I left the bank.

Q. Chase National Bank was a National Bank as distinguished from a commercial bank licensed by the State of New York?

A. Yes.

Q. You said something about passbook account department. What do you mean by that?

A. I don't believe I said that.

Q. Are you acquainted with banking patterns in the State of New York?

A. Yes.

Q. Will you please state what that pattern consisted of?

A. To discuss it quickly, New York has its own pattern of banking institutions, it is not identical with that of other States; it consists in a good part of institutions set up for special objects and restricted in their activities and in the character of assets they can invest in, to those objectives. In the type of financial institutions that take the funds of the public we have three main classes of institutions, we have commercial banks, we have mutual savings banks, we have savings and loan associations; the earliest is the commercial bank; I think the history began about 1791 when the first commercial bank was chartered. Up to about a hundred years ago, say to about 1850, the function of a commercial bank was pretty much to lend its credit by issuing its own bank notes which are payable in gold and currency, and circulate as money. About that time deposit currency, or what we call a check on a commercial account began to come in, although note issue was the most [fol. 370] important, as shown to some extent by the situation when National banks were created in 1863. Three years later a tax was put on State bank notes, and the number of State chartered banks dropped from 340 to 60 between 1865 and 1867, but about that time deposit currency came in much stronger and the State system picked up again, so we had originally the printing of note issues of the banks, then deposit currency. So far as time accounts were concerned, commercial banks apparently did not come in the field to any substantial extent until say about the beginning of 1900. That move was accelerated by a number of things. In 1913 the Federal Reserve Act was passed which created reserves against deposits, and they distinguish between the rate of reserves on time deposits, which was three percent and the rate of reserves required on time deposits which varied in accordance with the size of the com-

munity, running from seven to ten, to thirteen, thirteen being applicable to central reserve cities, New York and Chicago, so that these reserves which immobilized in effect a certain portion of investing people's funds of the bank by being kept in a Federal Reserve Bank as a reserve gave impetus to time accounts, because the reserve was less. We had a sort of secondary impetus in the passage of the McFadden Act in 1927, which gave the National banks the power to have a branch in their own cities if it were not in conflict with State law. Then the conditions in the late twenties were such that lending rates were high, and particularly the Stock Market was active in the late twenties, you had to find where loan rates were higher, particularly [fol. 371] Stock Market loans were active and yielded higher rates, so that many of the commercial banks went in more keenly for time accounts.

Mr. Grimes: I think I shall object at this time. It is interesting, but I think he has gone rather far afield, unless there is some specific proof which would make it relevant in some way.

Mr. Rollins: I want to show savings banks, accepted time deposits long before the practice of commercial banks accepting time deposits, and it was not the savings banks interfering with commercial banks, but it was the other way around.

Mr. Grimes: I object to that.

The Court: That would be a conclusion to be drawn if it meant anything, even after it were drawn.

Mr. Grimes: We accept the statute as we find it.

The Court: I think it will do no harm to let this gentleman give us sort of a chronological history of banking in the State as he has given it. True, it is hearsay, except for what he personally touched upon but I think it might make the record complete. As a matter of fact in your opening I thought you contributed wisely to the law with respect to this case by giving us a picture of the conditions at the time of the McCullough versus Maryland decision. This is in the nature of the same thing, and it seems to be in the same vein you spoke of.

[fol. 372] Mr. Grimes: If that is the purpose, I have no

objection. I cannot see the relevance on the Attorney General's part, however.

The Court: I would have to say the testimony is not meeting any issue in the case other than——

Mr. Rollins: I promise the Court it will all be connected.

The Court: All right. I say, up to the present time it is giving us a picture and background which may explain some things that are somewhat isolated.

Mr. Grimes: Very well, sir. I have no objection.

The Court: If you want to press your objection, let it stay on the record, and I will overrule it. I think that would be the better, lawyerlike way for you to proceed.

Mr. Grimes: Very well.

The Court: I will overrule Mr. Grimes' objection.

The Witness: That led commercial banks to seek more aggressively passbook accounts, which are one of the categories of time deposits.

Q. When you say passbook accounts, what do you mean?

A. A passbook account has ordinarily two features, one that no payments are received, more particularly withdrawals are not permitted unless the passbook is presented at the institution; and, secondly, there is ordinarily a time clause associated with it which gives the institution [fol. 373] the right, if it so chooses, to demand notice, generally runs 30 days or more.

Q. Is that the reason why the term time is applied to a deposit?

A. Time deposits, generally speaking, at least for reserve members in a Federal are deposits that are not payable except on 30 day notice, or within 30 days of any given date.

Q. As distinguished?

A. As distinguished from a demand deposit where they come in and get payment on request or demand.

Q. Did I understand you to say because of the McFadden bill which allowed branch banking plus speculation in the Stock Market commercial banks adopted a more aggressive policy to get passbook accounts?

A. Yes.

Q. I mean, they were incentives to develop that aspect of their business, commercial banks wanted more money to loan at high rates for Stock Market purposes?

A. You may put it the other way, investment opportunities being advantageous they sought to get as many as they could and it chose the avenue of developing passbook accounts as one source to get funds which they could employ in that profitable market to increase their income.

Q. When was it?

A. My best recollection is just before the Stock Market crash in the latter part of 1929, call loan rates were as high as ten percent. Following the stock market crash and the bank holiday commercial banks, at least in New York City, lost a good bit of their previous interest in pushing the passbook accounts where they paid special rates of interest, or higher rates than they could on checking accounts at that time, and in effect, discouraged passbook accounts by [fol. 374] reducing the rate of interest they paid to quite low levels, they went down as low as about three-quarters of one percent, and at least one bank in effect wrote letters to these passbook accounts inviting them to withdraw them. That was an incident of early 1930. More latterly, in 1933, the statutes prohibited payment of interest on demand accounts, so that there is again in the present picture an incentive to develop passbook or time account business. Savings bank history starts a little later; 1819; they were originally organized to help servants, laborers, people of small means, to encourage them to save money and give them the benefit of the accumulation of interest. They took form at that time, being somewhat philanthropic history.

Mr. Grimes: I must object to this.

Mr. Rollins: Your Honor can take judicial notice.

The Court: I will allow it. It is his observation of the practice in the banking business, is that right?

The Witness: I am trying to tell of general incidents and general policy.

By the Court:

Q. These are your own observations and conclusions?

A. That is right. They can be found reported in books giving the history, if you want to consult them.

The Court: I overrule the objection.

The Witness: Savings banks started as—somewhat from

[fol. 375] philanthropic motives, you found prominent citizens setting up savings banks, which was set up in corporate form, although there was no stock, they were just the deposits and initially small funds to be put up by the incorporators to act as a guaranty fund which was subsequently replaced by earnings in the savings bank itself, and they built up their own surplus funds, they were mutual, and by the history of investment, the powers of savings banks have always been in a very restricted area, so-called statutory local laws which set forth the qualifications that must be met by investment before a savings bank could meet it, and later they let them invest in secured obligations, that is, those secured by real property, those secured by investment, that they could invest in directly themselves. The concept gradually changed, philanthropic concept as the savings bank grew bigger, but it continued to be directed at serving the average person for his savings as evidenced by statutory limitations on the maximum amount that could be accepted from any one depositor, that was increased from \$3000 to \$5000 in 1920, and from that \$5000 to \$7500 in 1926, which is the present level. Savings and loan associations got a somewhat later start, I would say just prior to the fifties they started on the principle that time it was virtually impossible to obtain mortgage funds, so instead of a man patiently saving until he got \$2000 or whatever was [fol. 376] required, then building his house, ten of them would act together and each of them would put aside a certain sum a week and when the first \$2000 was gathered it would be bid for and that fellow could then start building his house, and he could continue to make repayment of his loan, sort of revolving fund money, people interested in building their own homes, to allow them to do it earlier than by first having to make complete savings. That concept changed over a period, people put money in savings and loan associations, and were not interested in homes as a good investment. That, in concept to organization, is still somewhat different from the stock concept in a commercial bank, and now no stock concept in a savings bank. Here you had a share corporation, whereas money that was put in was put in as the owner's, but unlike a stock corporation

it was withdrawable on request, and subject to the ability of the association to meet the withdrawal.

Mr. Rollins: Savings and loan?

The Court: Savings and loan?

The Witness: It is a share corporation, but not a stock corporation, but traditionally you have a savings and loan association interested primarily in financing of small homes. To sum up, in effect you have commercial banks primarily interested in making loans to business, and in the handling of checking currency; at this time the savings banks in promoting and catering to the savings needs of the middle [fol. 377] income group, or small saver on a mutual concept, with investment being somewhat limited in area, and the savings and loan catering to primarily the financing of small home mortgages.

New York has other specialized types of institutions. It has credit unions which are somewhat like a savings and loan, in that they are a share corporation, but not a stock corporation, the difference being they make an unsecured loan to their members in limited amounts, and later days they were confined to people having some outside common interest, such as a common employer, or membership in a labor union. We have industrial banks which, similar again to the commercial banks, although they cater particularly to making loans to salaried people or to small businesses, but you have a rough pattern of specialized type of institution for special, or to aim at particular segments or aspects of the public or economic life, and I might say in passing that the mutual savings bank is not a common thing throughout the United States, it is limited principally to New England and the Middle Atlantic States. There are mutual banks only in 17 of the 48 States.

By the Court:

Q. Did you say mutual banks?

A. Mutual savings banks.

Q. That is not New York?

A. Yes, New York are mutual savings banks.

[fol. 378] By Mr. Rollins:

Q. What does that mean?

A. By mutual is one in which there are no equity interest, that the bank is owned by the depositors, that all income after payment of expense goes to the benefit of depositors, either in the form of dividends or retention of dividends as surplus to provide a margin of protection.

Q. There is no outstanding stock on which profit is paid by any holder?

A. No.

By the Court:

Q. The surplus of a savings bank is divided in what way?

A. I said, sir, that earnings after expense are either distributed as dividends to depositors, surplus earnings if you will, either distributed to depositors in the form of dividends, or retained by the savings bank in undivided profit, if you will, or surplus, as a margin of protection for the depositors.

Q. Is that money ever paid to depositors as dividends, or is that just that they can do it?

A. Oh, no. Under the statute dividends can be paid either semi-annually or quarterly, and they are paid at least semi-annually or more frequently in every savings bank.

Q. Is that a regular practice, to pay dividends, by savings banks?

A. Yes.

Q. That is not applying it as interest?

A. That is what I was just going to say. It is colloquially known as interest on your account.

Q. That is what I understood.

A. In other words, we have a debtor and creditor relationship, and we have a corporation making earnings, but there is no promise of what rate is going to be paid. It waits until the end of the financial period, at which time the trustees of the savings bank would review earnings and declare in accordance with their financial position, what ever dividend they felt was warranted, retaining the balance within the corporation for surplus protection, and that dividend is colloquially known as interest on your savings account.

Q. The old-fashioned way that my grandmother indulged in was to personally carry her book down and stand on line at a certain period of the year and have something entered in that book which added to her deposits.

A. That is correct. That is what I am calling dividend, which is frequently called interest. In other words, it is their share of earnings for that period distributed.

Q. What is the distinction between a commercial bank and a savings bank?

The Court: In what respect?

Q. In regard to distribution of earnings?

The Court: I think he already stated. Let him state it.

The Witness: I presume what you are referring to is in the treatment of passbook accounts in a commercial bank.

Q. I mean commercial bank—

The Court: I think what counsel wants to put on the record is in a commercial bank the profits go to stockholders; [fol. 380] the savings bank, what we will call profits go to depositors.

The Witness: That is correct. In the commercial bank payment is made as interest to passbook accounts which is treated as expense of operation, the remaining profit going to stockholders.

By the Court:

Q. That is passbook accounts in the commercial?

A. That is correct.

Q. I was speaking generally about the profit of a commercial bank. They confine their earnings to stockholders?

A. That is what I said later and the party did not read after—

The Court: Leave that out. That was just comment to me. Leave out about did not read.

By Mr. Rollins:

Q. Do both banks, commercial and savings banks when they receive deposits and pay upon withdrawals use the passbook system?

A. I do not think there is any distinguishing difference in the method of handling between the handling of a passbook account in a commercial bank and a passbook account in a savings bank. Do you want me to elaborate?

The Court: Yes.

The Witness: A customer brings in his deposit with a [fol. 381] passbook, enter the amount to his credit. In every case, if he wants to withdraw he signs a withdrawal slip, brings in the passbook, receives the money and a debit is entered in his passbook.

Q. That is a passbook issued by both the commercial bank and saving bank?

A. Some rough form of passbook, place provided for debit, credit and balance, same form.

Q. That would be a time deposit?

A. In both cases they would be time deposits.

By Mr. Rollins:

Q. Are there any advantages or disadvantages in the form of restriction in the type of business conducted by a commercial bank and a savings bank?

Mr. Grimes: I am going to object to this question.

The Court: Do you mean in the investment field, or reception field of money?

Mr. Rollins: In the reception field and——

The Court: You are asking for a comparison between a commercial bank and a savings bank.

Mr. Rollins: Savings bank.

The Court: Do you think the gentleman can tell us any more on the receiving of money than he has told us?

Mr. Rollins: Yes, it is a matter of fact——

The Court: Just a minute. Is there anything about the receiving of deposits in a savings bank, and we will call it passbook account in a commercial bank that you [fol. 382] have not told us and that you would like to add to this exposition?

The Witness: There is a difference. One is relating to passbook accounts and as relating to other powers of commercial banks to receive deposits. In a savings bank they

can only take a time deposit. They are restricted by statute to \$7500 for an individual, to take from him and they cannot take any funds of a corporation. In the commercial bank, in addition to the power to take time deposits, which they sometimes do in the form of passbooks, they can also take check deposits which savings banks cannot do, and they take funds from corporations as well as individuals.

By Mr. Rollins:

Q. Is there any restriction on time deposits as to the amount they will take or could?

A. I know of no restriction.

By the Court:

Q. When you speak of a commercial bank, you mean a National bank as well as a State bank in every instance?

A. Yes.

By Mr. Rollins:

Q. Are there any advantages and disadvantages in powers and restrictions in respect to investors?

A. I described pretty much the savings bank power which is the likely loss of investment supplemented by such additions as might be approved by the Banking Board, and the power to invest in mortgages. In commercial banks they have the additional power to make an unsecured loan, and included in that the power to make a personal loan at rates higher than the ordinary six percent, usury rate. To some extent the mortgage powers of a commercial bank are less broad than those of a savings bank.

By the Court:

Q. When you speak of those powers in a commercial bank, are you speaking strictly of passbook money?

A. In a commercial bank there is no restriction that requires you to distinguish between the money obtained from checking, deposits of money obtained from passbook deposits; it is not segregated in New York State, or subject to any particular requirement as to how it be invested. You do have limitations that investment in mortgages cannot

exceed a certain relationship to time deposits, but it does not force you to invest them in that particular type of investment. You have one other distinction which relates neither to deposits nor to assets, and that is the question of branch powers. The commercial bank branch powers in New York State are much greater than those of the savings banks. The savings can only have a branch within its own city, and in a city divided into boroughs or counties, within the same county, and they are limited as to number. If the population is a million or more a savings bank can have three branches; if it is over 250,000 and less than a million, two branches; if it is in a place of 30,000 or more and less [fol. 384] than 250,000 one branch. There is no power given to savings banks to have any branch outside their own city limits, and only to have a branch within the city if the population is 30,000 or more. In commercial banks there is the same power to have a branch within the city, that is, there can be a branch in any city of 30,000 or more population in a city, but there is no restriction as to total number, they can have, no limitation as to number within the city, although there is a requirement the amount of their capital exceed by \$50,000 for each branch, minimum capacity requirement under State law, but ordinarily banks are so well capitalized in excess of minimum requirements there is a substantial latitude as to the number of branches. In addition so far as commercial banks are concerned New York State is divided into banking districts. For this area, which is the first banking district which comprises the County of Kings, Queens, Nassau and Suffolk the proviso in effect is that a commercial bank may have a branch in another city or village within the same banking district providing there is no other branch located there, unless they would acquire such a branch by absorbing an existing institution in that area.

Q. Franklin Square, Nassau County, wherein this defendant is located, has a savings bank?

A. No.

Q. If there was a savings bank in that particular locality where the defendant bank is located, Franklin Square, could it open a branch office?

A. On the assumption I think I am correct, the zone

Franklin Square is a place under 30,000 population, so I don't even know whether it is a city, I [fol. 385] think it is not even a city *even a city*, but answering on those assumptions I think they are correct, a savings bank could not have a branch either within Franklin Square or elsewhere in the banking district outside of Franklin Square.

Q. Entire Nassau County?

A. Entire Nassau County, right.

Q. That applies to Nassau County, no branch could have been opened in Nassau County assuming there had been or there was a savings bank in Franklin Square?

A. A savings bank in Franklin Square would have no power to open a branch anywhere.

By the Court:

Q. Because it is under 30,000?

A. Right.

By Mr. Rollins:

Q. The defendant in this case has three branches in addition to the main office in Franklin Square?

A. That is my understanding, knowledge and belief.

Mr. Grimes: I do not understand the purpose.

The Court: That point you are now raising is in the record beyond dispute. It was testified the bank has altogether three branches.

Mr. Rollins: Altogether four, one Levittown, Rockville Centre—

The Court: That is all in the record. The witness [fol. 386] says he understands that to be so.

Mr. Grimes: Is there any purpose in it? We have a main bank and we have three branches. We are well under 30,000, Franklin Square.

Mr. Rollins: My purpose is to show they are in a better position than a savings bank, and the savings bank is not competing with them.

The Court: He would have a right to ask the witness how many branches it has. I will allow it. This is direct testimony.

Mr. Grimes: Yes. I do not object to that.

Q. Are you acquainted with the provisions of Section 258 of the State Banking Law?

A. Yes.

Q. Could you tell me whether under that provision the State Banking Department has considered during the years since its existence that the terms in advertising reading, solicitation of time deposits account by commercial banks, such as special interest account, compound interest account and thrift account would be violative of the provisions of that Section?

Mr. Grimes: I object to that.

The Court: I will have to sustain the objection. It does not matter whether the Banking Department considered it. That might be something for cross examination to show acquiescence.

Mr. Rollins: Your Honor is stating to me that the term, [fol. 387] equivalent, that wherein commercial banks are restricted in the use of the term, saving or savings, your Honor intimated to me the word equivalent means something to me?

The Court: That is right.

Mr. Rollins: I felt by that remark the Court believed actually the use of the term, special interest account, compound interest and thrift may be violative of the Section, by the ruling of the State Banking Department, and hence, and making it impossible by the use of those terms by a National bank of performing its natural banking function. If your Honor feels the term equivalent, term saving or savings, and the interpretation of the statute by the Court is ambiguous, I am prepared to offer proof by this witness by the question I propounded, by the practice of the Banking Department of the State of New York and its interpretation would aid the Court in its interpretation of the Statute. That is my sole purpose in asking that question, and to show that actually employed by commercial banks, inclusive of National banks, by the use of the three terms is not violative of the section unless your Honor makes a ruling the statute is ambiguous, but if the Court feels the statute is unambiguous I am willing to offer proof by this

witness to aid the Court, which would be admissible in evidence.

The Court: Before you make an objection let me ask the witness this question, bearing on that subject.

[fol. 388] By the Court:

Q. Does the Banking Department have regulations formally promulgated?

A. No, sir. You mean on the subject?

Q. On this subject.

A. That is what I understood you to mean.

Q. Is there any formal action taken by the Superintendent of Banks with respect to this subject? That is the treatment it as to his employees for instance, or direction to the commercial State banks, is there any formal action that has been taken by him?

A. Well, to answer it within the limits of what you have said, where we have observed the private banker—

Mr. Grimes: I am going to object to the answer unless you confine yourself strictly—

The Court: Let Mr. Ludemann answer, and then you move to strike it out, because I really only want the formal conduct on the part of the Superintendent of Banks. Go ahead.

The Witness: We have had cases where a private banker would use the word, savings, in conjunction with the solicitation of passbook accounts with him. If we found that we would write to or tell him that we deemed it violative of that provision, and as a matter of supervisory policy would see that he desisted.

Q. That would be the individual case?

A. That is right.

[fol. 389] Mr. Grimes: I move to strike it out.

The Court: Yes. That will be stricken out as not responsive to my question. My question is, and I think you have enough official background to understand it, is there any formal action which covers a field, entire field, or a limited field that has been taken by the Superintendent of Banks with respect to the provisions of Section 258 treating with said bank?

The Witness: May I ask you a question?

The Court: Yes.

The Witness: Do you mean by that, have we ever put down in a written statement we deemed it to mean this or do you mean we have a policy we followed?

By the Court:

Q. No, I am not asking for policy now.

A. The answer to your question is in the negative, there is no formal action.

Q. There is no regulation on the subject? Now you complete that by saying there is no formal direction from the Superintendent of Banks treating with that subject?

A. That is right.

Mr. Rollins: I think if he had official cognizance those terms had been used, and they did nothing about it—

The Court: There was to be an objection by Mr. Grimes.

Mr. Grimes: Yes. I object to any interpretation or attempted interpretation of the term by this witness.
[fol. 390] The Court: Your application was really a motion to strike out. He had answered.

Mr. Grimes: I thought that had been granted by the answer to your question. I also meant to strike any answer to the previous question along the same line. Is that granted?

The Court: You have your motion, and the witness answered before I questioned him. I think that I must sustain the objection.

Mr. Rollins: I respectfully except. I am prepared now to offer proof the State Banking Department of New York, State of New York, through the years commencing from the year 1920 up to the present date had officially—that National banks and commercial banks in the State of New York in advertising for savings accounts in the newspapers of the State of New York, had used the terms thrift account, special interest account and compound interest account, and in an attempted compliance with Section 258 of the State Banking Law, and—

The Court: Leave out of that offer the operation of their minds, leave out the motives. You are making an

offer of proof. You could not prove what these banks had in their minds. Just leave that out.

Mr. Rollins: That they advertised for time deposits, and used the term in describing them those accounts alternately thrift account, special interest account and compound interest account, and that the State Banking Department took no official action, although they knew of it.

[fol. 391] Mr. Grimes: I object to the form of the question.

Mr. Rollins: Showing the conduct of the State Department, and that would tend to establish I might say by indirection or inference their interpretation of the statute, and I also state it is presumed in point of law that the State officials are deemed to comply with the law in the performance of their duty.

Mr. Grimes: I object to the form of the question and the numerous statements made, also the substance. Is it now an offer of proof?

The Court: It is an offer of proof. The substance of this offer of proof is as I understand it, that, although the State Banking Department knew that these three terms we discussed were being used by the commercial State banks it took no action against those banks because, and you want to prove this also, the State Banking Department concluded that the use of those terms was not a violation of Section 258.

Mr. Rollins: Yes, by knowledge of that fact, and consequently the presumption of law that each public official's knowledge of the facts is presumed to have performed their duties.

Mr. Grimes: I object.

Mr. Rollins: And that conduct of a State agency charged with the enforcement of any particular statute which may be considered ambiguous tends to aid the Court upon [fol. 392] proper construction of the statute under the rule or principle of law applicable.

Mr. Grimes: I object.

The Court: I will sustain the objection to the offer of that proof. I do not consider that the conclusions of the Banking Department as to what is or what is not a violation of Section 258 would be binding upon the Court or even would be any aid to the Court in the interpretation of the statute.

Mr. Rollins: The only reason I offer it is because the inference I received from the Court's statement the word equivalent means—equivalent means savings. I felt the Court thought it was an ambiguity. I say the conduct of the agency and their policy in the cases I have given tends to aid the Court on a proper construction.

Mr. Grimes: May I ask this question?

The Court: I have passed on this subject. I have sustained the objection to that offer of proof.

Mr. Rollins: I respectfully except.

By Mr. Rollins:

Q. Would the word, savings be equivalent to the term, saving or savings as stated in the statute?

Mr. Grimes: I will object to this.

The Court: Maybe I could receive that evidence, but the question would have to be worded a little bit different. I think it will ultimately be for the Court to determine [fol. 393] what the word equivalent means.

Mr. Rollins: I submit—

The Court: Just a moment. But if you can develop through an expert witness like Mr. Ludemann that there is a term in the trade, in the business, that is universally recognized, I think I ought to receive that evidence as throwing some light on what that expression saving or savings or the equivalent, I think that is the wording of the statute, or the equivalent, I should receive that testimony, but it would have to come in in the ordinary way that anything else would be brought in where a practice in the trade or calling not necessarily known to the Court would have its peculiarities.

By Mr. Rollins:

Q. Is there an understanding in the banking business as to the meaning of the term saving or savings, or the equivalent?

Mr. Grimes: I must object to that unless the question means merely do they understand the English language, in which case I object upon the ground—

The Court: Mr. Rollins has to begin somewhere to try

to develop this point. Whether he is right or not I want him to have an opportunity to develop it. Suppose we, and I do not feel capable of doing it myself, I think you know more about it than I do, but suppose we begin with it this way: just the same as if it was about the making [fol. 394] of shoes, or how you manufacture automobiles. In the banking business, according to your experience, is there a recognized necessity for making a distinction in the prosecution of the business between the use of the word saving and savings and any other word, in advertising?

The Witness: That is hard to answer, except by observation and I would make——

By the Court:

Q. You have to answer from your experience, and it will have to be notorious enough so that everywhere you went they would have that understanding?

A. Allow me to try to answer it.

Q. Could you answer yes or no to begin with? Is there of necessity in the banking business a recognized distinction as to the use of those words in advertising? Would you say yes or no?

A. I am puzzled by the word, necessity as you phrase it. Do you mean do they?

Q. Leave out necessity. I put it in for a purpose.

A. I will say yes to that, then, my understanding.

The Court: You say there is a recognized distinction in the banking business in using those words in advertising. He just says yes to that broad question.

By Mr. Rollins:

Q. What is that difference?

A. Savings banks use the word in their advertising. Commercial banks refrain from using the word in their advertising; by that I mean the word saving, savings or saving.

Q. Does that include foreign languages?

A. If they would be advertising in foreign languages, the commercial banks would not use the foreign language equivalent.

Mr. Grimes: I move to strike out the answer to those questions, foreign language, his observation of what banks do.

The Court: Yes. We will have to strike out those answers. I can only receive this testimony if it is a recognized practice, so you will have to put your questions in that form in each instance.

Mr. Rollins: To use the word saving or savings?

The Court: Yes, or not to use them, or to use those other words. You can go on with all of them. I asked the witness if in his experience there was a distinction in the the business and he answered yes to that.

By Mr. Rollins:

Q. There are two different classes of banking, commercial and savings?

A. Yes.

Q. Is there a distinction in the term saving or savings in the banking business?

A. Yes.

Q. Give us the distinction.

A. Savings banks use the word savings and commercial banks do not.

Mr. Grimes: I make the same objection.

The Court: Let me ask this question. Maybe it will cure the objection.

[fol. 396] By the Court:

Q. Is that a recognized practice in the banking business?

A. It is recognized by the fact that advertisements are public, circulars are distributed; you see in the circular distributed by savings banks the use of the word savings; I do not observe in the material distributed by commercial banks the use of the word saving or savings.

Mr. Grimes: May I move every answer—

The Court: I want to ask one more question to try to make his answer stand, if I can.

By the Court:

Q. In answer to that last question you spoke of your own observation?

A. Right.

Q. What we say is law. You are thinking out loud. The question was not your observation. The question was as a general practice in the banking business is the use of these words recognized as distinctive terms having application to particular activities in banking?

Mr. Grimes: I hesitate very much to object to the question you ask, but I feel I must. It has no bearing upon the issues in this case, and does not aid the Court in the construction of the statute.

The Court: I will say this, that if the Attorney General can establish that there is a trade practice in the use of [fol. 397] these words or in his use of these words, and I am including all the words, the whole four or five, I would allow him to put that on the record if there is such, but all we have on the subject is the one answer, that there is a distinction. He has said there is a recognized distinction in the banking business. That is not enough to establish a trade practice.

Mr. Grimes: No, sir, especially now where if there is a distinctive use it presumably comes from the fact there is penal statute on the subject.

The Court: Any kind of trade practice that is violative of the law is never allowed to be established, but I think we ought to have it, if it can be done. I am not so sure there is this trade practice.

Q. Is there a trade practice by banks?

The Court: I think the objection to the Court's question will have to be sustained. What was the other motion?

Mr. Grimes: There was a motion to strike it out, all answers to the questions on that subject.

The Court: I will strike out those answers. They were not responsive to the questions. The gentleman was giving his own personal observation, whereas the Court has ruled the question must treat with trade practice, not individual observation.

[fol. 398] By Mr. Rollins:

Q. We are not concerned with what you think. You know the trade practice in banking?

A. Yes.

Q. That is because of your association with the Deputy Superintendent of Banks?

The Court: His long experience.

Q. Your long experience working in the banking business?

The Court: He has given us that.

Mr. Grimes: I concede his qualifications.

Q. Is there not a trade practice in advertising for time savings accounts by savings and commercial banks in the State of New York?

Mr. Grimes: Objection.

The Court: I will allow that.

Mr. Grimes: Just yes or no?

The Court: Yes. Is there a trade practice?

Q. In advertising for time accounts?

A. Yes.

Q. What is the trade practice in advertising for time accounts by various banks of the State of New York?

Mr. Grimes: Objection.

The Court: I allow that.

The Witness: It is the practice of commercial banks in advertising for passbook time accounts to use terms such as [fol. 399] thrift account, special interest account, compound interest account. It is the practice of the savings banks to use terms such as savings accounts.

Q. Any others?

A. It is found in practice.

Q. Forget about practice.

A. Any others? I cannot get what you mean if you don't mind.

Mr. Grimes: I move to strike the answer, not germane to any issue in this case.

The Court: I will deny the motion. Let it stand.

Q. Is there an equivalent of the word savings, used by savings banks?

A. Yes, savings, yes, money occasionally.

The Court: You are back now to individual cases, and he is answering exactly as you put it. I will have to strike that out because we are only talking about trade practice, Mr. Ludemann, talking about some banks say, save your money.

Q. Talking about all banks, trade practice.

The Court: Mr. Ludemann, keep in mind these questions are directed only to the trade practice, not what some individual bank might or might not do, some recognized practice. As you know, all trades have their practice.

The Witness: I will answer it in that light. It is a trade practice of savings banks through a common advertising [fol. 400] pool that they use to include sometimes in their advertising save your money in a savings bank.

Q. Is there a distinction between the service created to the public, a passbook account and a commercial account in a savings bank?

A. The service that can be extended by a commercial bank is broad. It can accept more money, they can accept money from corporations; there is a distinction in service in this respect, that a savings bank can only invest the funds they receive in savings accounts in a rather restricted area of investment, and commercial banks accounts invest funds it receives in passbook accounts in a much broader area. A savings bank is a mutual institution.

Mr. Grimes: I am going to move to strike out the answer, to the question asked. It was the service. We are getting far afield. What they do with the money after they get it.

The Court: I think it is broader than the question now.

Q. Is there any competitive use in the passbook account, I mean comparatively compared with using passbook accounts in commercial banks and savings banks?

Mr. Grimes: I object to the question, unintelligible.

The Court: You mean from the point of view of the depositor?

Mr. Rollins: That is right.

[fol. 401] The Court: I would have to sustain the objection.

Q. The use of commercial banks by citizens throughout the State, does it vary in various parts of the State of New York as to the number of deposits and the amount of deposits?

Mr. Grimes: I object to the form of the question.

The Court: I allow it.

Mr. Rollins: Question withdrawn.

The Court: Counsel means is business transacted by commercial banks in different parts of the State of New York different from other parts?

Mr. Rollins: No, I don't mean that.

Q. Do commercial banks in the State of New York, outside of the City of New York, receive by comparison more time deposits than do the commercial banks within the metropolitan area, namely, within the City of New York?

A. More outside of New York City than in New York City in proportion to total deposits.

Q. Where would you find that with relation to position in the State of New York?

A. Well, you find up-State in certain places that commercial banks are very active in the solicitation and servicing of time deposits in the form of passbook accounts.

Q. What is the proportion of those time deposits and demand deposits in commercial banks up-State?

A. The total deposits outside of New York City in State commercial banks is about three billion dollars, of which a [fol. 402] little over one billion dollars is in passbook accounts. I state total deposits in State commercial banks outside of New York City is three billion dollars. The total time deposits are one billion one hundred million.

Q. That is a ratio of approximately three to one?

A. About one-third.

Q. How does it compare within the City of New York?

A. In New York City the total deposits of any State commercial bank is fourteen billion, nine hundred twenty-

three million; total time deposits are one billion, fifty-one million, or a ratio of close to fifteen to one.

Q. Is there a reason for it statistically?

A. Statistically I think it depends a good deal on bank policy, on whether it goes out to emphasize that particular phase of business.

Mr. Rollins: You may inquire.

Mr. Grimes: Do you want me to start now, sir?

The Court: Adjourned to 2:15 P.M.

FRANCIS J. LUDEMANN, a witness called in rebuttal on behalf of the plaintiff, resumed the stand and testified further as follows:

Cross-examination.

By Mr. Grimes:

Q. Mr. Ludemann, your total is 35 years in the banking field, 21 and 14?

A. No, 21 years in the Banking Department, 11 years prior, that is 32 years.

[fol. 403] Q. Yes, 32 years?

A. That is correct.

Q. Are savings banks in your opinion in competition with savings and loan associations?

A. I would say that both compete for possible business from the public.

Q. With specific reference to deposits, people's money, are they in competition?

A. Savings and loan associations cannot take deposits.

Q. They take investments, don't they?

A. Yes.

Q. Are people sometimes confused about that, in your experience?

A. I have no way of answering yes or no on it.

Q. Do you have an opinion on the subject?

A. I have no firm opinion as to what is in other people's minds, or whether they are confused between them.

Q. You have no firm opinion?

A. That is right.

Q. You have some notion?

A. I cannot answer the question as to whether or not they are confused. I have nothing I know of that would suggest to me they are confused.

By the Court:

Q. You have nothing to base it on?

A. Correct.

Q. Never made any inquiry?

A. That is right.

By Mr. Grimes:

Q. In your official position you watch advertising of various financial institutions?

A. We don't make a practice of supervising advertising. We do see them from time to time but we have never attempted to supervise advertising.

Q. You yourself, apart from your official duties, and in your capacity as an official interested in banking, you [fol. 404] watch ads. in the State of New York papers?

A. I read them in the Long Island Press.

Q. Savings and loan associations advertise for deposit accounts?

A. I have no recollection of seeing it here; I have seen it once in Poughkeepsie.

Q. Is that the only time?

A. That is the only time I have seen it.

Q. They do advertise for deposits?

A. I never observed that advertising.

Q. Have you observed any advertising by savings and loan associations?

A. Yes.

Q. Which you understand call for people's money, whether by way of investment, deposit, or whatever you call it, those you have seen?

A. Right.

Q. What do they call it?

A. Savings account, or savings shares quite frequently.

Q. Savings accounts or savings shares?

A. Right.

Q. Which of the two, accounts or shares, in connection with savings in your observation is used more frequently?

A. By state associations, by Federal associations, those that are insured with the Federal savings and loan insurance corporation, there is a tendency to use accounts more frequently.

Q. Which are in the majority, Federal or State savings and loan associations?

A. Federals are by size, I would say, also by extent of advertising.

Q. By volume of advertising, whether Federal or State, which words are used with greater frequency, savings account or savings shares?

A. Savings account.

[fol. 405] Q. No question about it?

A. I do not think there is any question.

Q. The great majority say savings account?

A. Correct.

Q. In your opinion are such ads. truthful?

A. All depends on the understanding of accounts. I understand them.

Q. You understand calling them say, savings account that means an investment, doesn't it?

A. I know the structure of a savings and loan association. I know it means a share account in a non-stock corporation.

Q. In your opinion does the public at large understand that difference?

A. I don't know whether the public at large understands it or not.

Q. Has it been a matter of bank discussion, with the exception of the public?

A. I will answer that, we have not objected where we saw our State savings and loan association advertise savings accounts.

Q. You have not objected?

A. That is correct.

Q. Have there been discussions whether or not you should object?

A. People have sent them in to us and say, look what they are advertising.

Q. No official action has been taken by the Banking Department?

A. Not that I know of, no.

Q. So far as you know, that matter has never been considered by any official of the State Banking Department whether or not the ad. of a savings and loan association, whether State or Federal in New York State, involved an element of deception?

A. Are you talking about a particular ad.? I would like to answer you responsively.

Q. I am talking about the great volume of advertisements [fol. 406] of savings and loan associations in New York State which you already testified described their accounts as savings accounts. That is what I am talking about.

The Court: The question is, did that subject officially come before the Superintendent of Banks?

Mr. Grimes: No.

Q. Whether there has been any discussion, official or unofficial, by anybody in the Banking Department as to whether or not ads. of that character might deceive the public?

A. I could not testify. There has been none so far as I participated in.

The Court: That is all you can answer.

Q. You do not know of any such discussions?

A. I don't know of any personally.

Q. Never heard of any?

A. I do not know of any personally or never heard of any personally.

Q. I am going to ask you this in relation to your opinion. What do you think about it, whether it might deceive the public?

A. My opinion is it does not deceive the public. I won't say I am necessarily a representative of public opinion, though.

Q. I did not ask you that. The answer is, it does not deceive the public?

A. Right.

Q. What do savings banks advertise as to their services?

A. Savings deposits generally or savings accounts.

Q. Which of the two is more frequently used in your opinion, if you have an opinion on the subject, based upon [fol. 407] your position?

A. My opinion would be the weight would fall with the advertising of savings deposits.

Q. Quite often savings accounts?

A. That I am not sure of. I would not want to say I ever saw it, never saw it. I think it may occasionally be used.

Q. Is there a difference between a savings account or deposit in a savings bank and a savings account in a savings and loan association, from the standpoint of the availability of money or in any other way?

A. There are differences. The savings deposit in a savings bank is a debtor-creditor relationship. The savings account in a savings and loan association is an interest in ownership. I think there is something further I can answer on it, but I forgot the balance of the question.

Q. I think that answers my question. Since there is merely that element of ownership in a savings and loan association, then deposits cannot be withdrawn in that way, is that correct?

A. (No answer.)

Q. A person, in other words, who has a savings account in a savings and loan association has no right to withdraw, no ability to withdraw his deposit, and no right to withdraw his deposit unless the particular association wishes to let him do so, is that not right?

A. The incident of ability to withdraw is subject to different regulations. In a savings bank there is a right in a savings bank to require 60 days notice; in a savings and loan association you can file a withdrawal and it can be paid in the order of filing as funds become available, and [fol. 408] there is an exception permitting the honoring of an amount up to some small amount out of turn, there is a difference in the way they may be repaid under the circumstances or the desire of the corporation not to meet them promptly, or inability.

Q. Would you regard that as a slight difference?

A. All depends on circumstances. I mean, under some conditions it could be a major difference.

Q. It makes a great deal of difference under some conditions?

A. Right.

Q. In other words, and correct me if I am wrong, if I have a savings deposit in a savings bank payable in 30 days, at the end of 30 days I have a right to demand that deposit back?

A. If you make it 60 days.

Q. Make it 60. Let us make it 90?

A. No, 60 day statute.

Q. All right, 60 days, and if I do not get that deposit back on demand the savings bank has to close its doors?

A. The Superintendent would have the power to take possession.

Q. And he would do so?

A. I presume so.

Q. That is, suppose a savings bank is insolvent.

A. You mean insolvent in failing to meet a demand for a liability? The answer is yes to you.

Q. In other words, a bank as a practical matter would pay or be insolvent and fall in the hands of the Superintendent.

The Court: Leave out insolvent, because it may not be insolvent. Its investments may make it.

The Witness: Except with this exception, that there [fol. 409] exists in the Banking Board of the State of New York power to regulate withdrawals from all banking institutions under sufficient or unusual circumstances, and I believe the power has been used to cover both an individual or universal situation, not recently changed, not, I would say within fifteen years.

Q. Not since the depression?

A. That is right. 1935, let us say.

Q. What happens when a person wants to get his money out of a savings and loan association? Can he do so?

A. He can do so, to the extent that they liquify enough assets and pay according to regulations governing the

manner in which they must honor requests that are filed for withdrawal.

Q. If they do not honor requests that are filed for withdrawal, what happens? In short, the depositor waits?

A. He waits. Do not hold me on this.

The Court: We must get the terms right. Mr. Lude-mann never said he is a depositor in a savings and loan association.

Mr. Grimes: I mean in advertising savings accounts.

The Witness: That account is not a deposit but a share

Q. Being a shareholder he must await liquidation?

A. If withdrawals are not honored after a certain period I think there is a right in the supervisory authorities to take possession. Of course, as a shareholder he also participates in profits and to some extent the return may be [fol. 410] greater in the form of dividends in a savings and loan association.

Q. We will get to that later. I am speaking now of withdrawals. State savings and loan associations are under your jurisdiction?

A. No.

Q. Just savings banks?

A. And trust departments of commercial banks and licensed cashers of checks.

Q. But State savings and loan associations are under the jurisdiction of the Banking Department?

A. Yes.

Q. You are generally familiar with them?

A. Not fully familiar with all accounts, I mean I know the general concept.

Q. Are State savings banks subject to the insurance fund of any sort?

A. This is State savings banks?

Q. State savings banks, yes.

A. All of the mutual savings banks in New York State are members of the Federal Deposit Insurance Corporation.

Q. In short terms, what does that mean?

A. That means an insurance through a corporation set up by the Government which would undertake to pay in cash

and subrogate itself for now, presently, to the extent of \$10,000 for any one depositor.

Q. For any one depositor? In other words, it really comes down to this that if a State savings bank is unable to pay on demand after say, a period of 60 days a depositor's demand for his money then immediately afterward the Federal Deposit Insurance Corporation must pay by the terms of the insurance policy?

A. That is roughly correct. I do not know whether there is a slight time interval.

[fol. 411] Q. Is the situation the same with regard to a person who has a savings account in a savings and loan association?

A. A savings and loan association, if they have insurance, are members of the Federal Savings & Loan Insurance Corporation.

Q. Most of them are, are they not?

A. I would say the greater portion of State associations are, and of course, all Federal Savings & Loan Associations must be.

Q. The end result and the answer is, yes, most of them are.

A. If you embrace both, yes.

Q. What is the deposit insurance arrangement where a savings and loan association—what happens on failure to meet obligations on demand?

A. I will say I do not know what the present status of that is. I know they are covered up to \$10,000; I know there was some optional methods of payment, some immediately and part over a deferred period, I think the power was recently.

Q. Some immediately?

A. That sounds right as to my recollection of the statute, when they raised the limit to \$10,000. I am not familiar with that amendment.

Q. And the balance over a period of years?

A. My recollection of the old was ten percent immediately and the balance equally over a period of three years.

Q. That comes into being, that is, the obligation of the insurance company only can be proved if the savings and loan association is insolvent, is that not correct?

A. That I don't know.

Q. Will you challenge the statement if it were decided that a savings and loan association was not insolvent in a [fol. 412] bankruptcy sense it might be in a period of liquidation for a period of some ten or twenty years before a depositor got all of his money?

A. Do you mean in that State or Federal savings and loan?

Q. State and Federal savings and loan.

A. Well, I would say,—I mean I am not competent, I think to answer fully. I think it is conceivable, but not likely.

Q. Is that not conceivable?

A. Could possibly be, but I do not think that result would be permitted to work out by the Supervisory Agency remaining passive that long.

Q. So far as you know that could happen?

A. It could. I could not absolutely say it could not.

The Court: Could I interrupt your train of thought by asking a question that I think belongs in here?

Mr. Grimes: Certainly you may.

By the Court:

Q. With respect to the insurance on the accounts in savings banks you said that all savings banks belong to this **Federal Deposit Insurance Association**.

A. Corporation, yes.

Q. Do they pay a premium like any other insured person?

A. They pay a premium.

Q. Now, then, to whom do they look for the funds, depositors look for the funds that insure their accounts? My question means, do they look to some Federal Deposit Insurance Company, or do they look to the United States Government?

A. The Federal Deposit Insurance Corporation is a corporation set up by the United States Government, and [fol. 413] it has in its assets the accumulation of these premiums that they have taken from banks over this period of years. I believe also, it has a right to call on the Treasury to borrow money in case the assets they have

ould be insufficient at a particular point. I do not think—
mean assuming they would exhaust all their own assets
and all borrowing power, that the Government itself is
under obligation to make good any shortage, or come to the
rescue, although conceivably it might as a matter of policy.

Q. You went over one very important part of my in-
quiry with rather a potential attitude. When the avail-
able funds of the Federal Deposit Insurance Corporation
are exhausted do you know, as a matter of law, from your
experience, does the Corporation then as a matter of right,
call on the Treasurer for more money?

A. I think as a matter of right they can borrow up to a
certain amount, that is, their own capital, from the
Treasury.

Q. The next question is, they have now exhausted their
borrowing powers, and there are still unpaid depositors,
do you happen to know where those people are paid from,
from what source, if they are paid?

A. I don't think they have any further source to look to
from the Federal Government. Of course, each time the
Federal Deposit Insurance Corporation pays out on a de-
positors' claim it is subrogated for his share of the assets
of that particular banking institution.

Q. You do not know?

A. I believe there is no further claim.

Q. So there could come a time in your understanding
[fol. 414] under the Legislation as we now have it, that
the savings bank depositor would not receive his deposit?

A. That is right. It could be a circumstance wherein
he would not be protected by Federal Deposit Insurance.

Q. There is quite an understanding to the contrary, that
is the reason I asked you about it. Now I want to ask you
about the savings and loan association. Those share-
holders are insured, are they not?

A. Yes.

Q. They are insured by the association itself, National
association?

A. There is another corporation called the Federal Sav-
ings Insurance & Loan Corporation.

Q. Is that a group that insures shareholders?

A. That is correct.

Q. Do they pay a premium?

A. That is right. The Association pays a premium to the Insurance Corporation.

Q. Does that association have available funds?

A. Insuring corporation?

Q. Insuring corporation.

A. They have accumulation of their premiums. Initially some capital was also put in by the Government; I am not a hundred percent sure whether that has been returned to the Government. I think they may have some mandatory call for borrowing on the Treasury, the same as the F. D. I. C.

Q. That answers that. But now I want to ask you the same question I asked you with respect to the other. When the funds of that Insurance group is exhausted, has it as matter of other right, the right to go any place and ask for more money?

A. Not that I know of. I think it is in the same position as the Federal Deposit Insurance Corporation, it has [fol. 415] to call for borrowed money to a certain extent, but no further call for the Government to make good any deficit it may have.

Q. Your answer would be the same when I say there could come a contingency where shareholders would not get the full amount of money they put in?

A. Yes, the same answer.

Q. With respect to the available funds in these two insurance corporations, do you happen to know, is there a larger fund available for savings depositors or a larger fund available for savings and loan associations, taking it in ratio? I do not know which there are the greater number of? Would you say there are more savings deposits than there are shares?

A. I cannot answer the question. There are more depositors' accounts insured than there are shares in a savings and loan insured, but I do not know the relative position of assets of the Federal Deposit Insurance Corporation vs. the Insuring Corporation against the Federal Savings & Loan Corporation in insured shares, I don't know which is the better ratio.

Q. I wonder if you could answer this question in one.

Assuming I asked you the same question with respect to National banks and their deposits, which they have received on which the law permits them to pay interest, you have called a passbook account?

A. Yes. They are in identical position as are the savings account of the savings banks, because they are both members of the Federal Deposit Insurance Corporation and subject to the same insurance and same assets.

[fol. 416] By Mr. Grimes:

Q. I just want to ask you about one more feature, in the insurance feature between the Federal Deposit Insurance Corporation which insures, as you said, the National banks and savings banks and insurance for savings and loan associations. It is true, is it not, that in connection with the latter insurance, that is the savings and loan associations, during a period of liquidation no interest is paid to shareholders?

A. I don't know. I am sorry.

Q. Will you accept my statement?

A. I would not challenge it.

Q. Whereas it is just the opposite with a commercial bank or savings banks, is that not true?

A. Well, I mean it is really academic, because you have suggested before in a commercial bank and savings bank—you have suggested before, that in the case of commercial and savings bank they would make immediate payment on its insurance when the institution closed. I do not think there is any provision in law, but I would not challenge it if you said there was. There would not be any interest to accrue.

Q. There are some differences are there not, of an important nature between a savings bank and savings and loan association. You mentioned investment policy this morning. Will you state what is the important difference?

A. You mean so far as investment powers are concerned, savings banks as against savings and loan associations?

Q. Yes.

A. Savings banks have less broad powers of investment; they are limited to 65 percent of their assets in mortgage [fol. 417] loans on real estate, resulting from a mortgage

loan, if they happen to have any, although an insured F. H. A. mortgage or the insured portion of the Veterans' loan do not come within that limit. In the case of a savings and loan association there is no limit on the amount of assets by statute that can be put in mortgages, the savings and loan association- have broader borrowing powers than savings banks do. Savings banks in New York are being limited to borrowing only for the purpose of repaying depositors. I think that answers the main ones.

By the Court:

Q. Is there a difference on an individual mortgage, while you are on the subject?

A. Yes. In the case of New York State Savings & Loan Association the general statute is they can lend to a member up to 80 percent of the appraised value, I think in the Federal Savings & Loan Association that is 75 percent of the appraised value, and that can be regardless of whether the property is new or old. In savings banks the general limit on the ratio of loan to appraisal is $66\frac{2}{3}$ percent, except with respect to owner occupied new construction; on construction within two years the statute is phrased, on single family, where they can loan up to 80 on the first \$10,000 and 50 percent on excess over that.

The Court: I am wondering if an error was made in the beginning of that answer?

By Mr. Grimes:

Q. Which type of institution—I am still talking about savings and loan associations and savings bank, New York [fol. 418] State variety, pay the higher return to the depositor or investor?

A. The savings and loan association over the years has paid a somewhat higher return to its shareholders than have savings banks paid to their depositors. I consider I finished the answer, unless there is something more.

Q. Is there a present average return paid persons, we will call them depositors, at the moment?

The Court: I would rather you stick to the terminology shareholder and depositor.

Q. Shareholder and depositor.

The Court: Let us keep the distinction. They make it
so let us keep it.

Q. Don't you know of your own knowledge, without recourse to books—withdrawn. What at the present time on the average do savings and loan associations pay their shareholders, if not average, give a range, please.

A. Roughly about two and a quarter on the average, all classes of shares considered.

Q. Is that dollars or percent?

A. Percent annually in terms of annual rate.

Q. And savings banks?

A. Substantially all are paying at the two percent rate.

Q. A number of savings and loan associations advertise a considerably higher return to their shareholders, do they not?

A. They indicate a possibility of getting it, I do not know as they advertise that they will pay it as to the future.

Q. You see ads. suggesting at least there will be a three [fol. 419] percent return?

A. I have seen ads. saying the current rate is three percent.

Q. Others saying the current rate is three and one-half percent?

A. I recall none of any New York association, Federal or State that I have seen, in recent years.

Q. The fact is, is it not, that savings and loan associations all over the United States advertise for investment in their shares in the New York area; that is true, is it not?

A. That is right.

Q. California Savings & Loan Associations advertise in the New York papers, urging New Yorkers to invest out there?

A. I don't know whether they advertise in New York papers. They advertise in trade journals that circulate in New York like the American Banker.

Q. You have seen such ads?

A. Yes.

Q. Illinois Savings & Loan Association?

A. Do not hold me specifically to a State. I have seen

them all, outside States; I don't know whether I have seen Illinois or not.

Q. You have seen them from all over the country?

A. From various States throughout the country.

Q. Advertising for New York money to be invested?

A. I don't know whether they are advertising for New York money or not. I mean they are advertising in papers that circulate in New York.

Q. What do you think the purpose is?

A. I presume it is to offer to the country by and large their investments.

Q. Don't you think it is, when they advertise here?

A. That is right.

Q. You don't have any doubt about it?

A. I am not suggesting there is no appeal to New [fol. 420] York. I did not want to say it was solely for New York money.

Q. You mean somebody outside of New York might read a New York ad?

A. Papers circulate. I mean the American Banker circulates all over the country. That is the ones you see this type of advertising most frequently in.

Q. You see it in New York papers?

A. Yes, sometimes in the Times, Tribune, but more often in the form of some individual advertisement on the availability of shares.

Q. Are savings and loan associations obliged to pay any income tax, State or Federal?

A. Federal savings and loan or both?

Q. Break it down any way.

A. Neither one is, to answer it.

Q. There is no point in making a distinction?

A. Right.

Q. Are they required to pay any income taxes at all?

A. Neither State franchise or Federal income.

By the Court:

Q. State franchise or Federal income? How about State income?

A. No State income, either.

By Mr. Grimes:

Q. How about State savings banks, are they obliged to pay Federal or State income taxes?

A. Not income taxes, but they pay State franchise tax.

Q. Is that a serious item?

A. It is more serious to them than is the franchise tax on commercial banks, because they have a minimum franchise tax.

[fol. 421] Q. What is it?

A. Base four and a half percent of income, dividends paid to depositors, allowing to be deducted a minimum tax of four percent on amount of dividends paid.

Q. Do you know what that averages a year in the case of savings banks, what percentage of its profits, on an average?

A. They run somewhere around .6, that is of their liabilities. If you will let me refer, I can tell you, but if not, I cannot tell you.

The Court: That is the first time we have had the word, profits used in connection with savings banks. Does a savings bank have profits?

The Witness: It has profits in the sense if it sells an investment for more than it bought it has profits so it is on net income, net profit. The term is used synonymously.

Q. Is that the only sense in which a savings bank makes profit, by way of capital gain?

A. Conceivably they might sell banking houses for more than they buy it, or for furniture and fixtures when as a practical matter the only assets they buy and sell would be investment securities.

Q. Do they get any income on their investment?

A. They get income on their investment.

Q. Sometimes does that income exceed the dividends paid?

A. Sometimes does it exceed it?

Q. Yes.

A. It generally exceeds it.

Q. It exceeds both the dividend paid and the total annual expense on occasion, does it not?

A. Generally.

Q. What is the difference?

A. The difference is net income not distributed, or [fol. 422] profit. If you will define accounting terms in which they are used I will answer them. So many people use them synonymously.

Q. You said you are a C. P. A.?

A. Yes.

Q. You know what profit is, in the general sense?

A. I have seen it used both ways.

Q. Are you suggesting some different term other than profit should be applied in the case of a savings bank to that between total annual income and total annual expenditure by way of dividends?

A. The usual term is net income.

Q. That is also profit?

A. Would include both earnings and profit.

Q. As a matter of fact most savings banks, defining the term that way, make an annual profit?

A. They have an excess of earnings and profit over expense, over dividends paid which, if you want to call that net profit they make a net profit.

Q. What would you call it?

A. I would call it net income period.

Q. On that net income they pay no State income tax; that is correct?

A. The income tax, yes, that is the ordinary measure that they pay income taxes against.

Q. Do they pay any State income taxes?

A. Franchise tax—excuse me, I am sorry.

Q. Do they pay any State income tax?

A. I mean, is there such a thing as State income tax from a corporation, or is it all franchise tax, or is an income tax paid?

Q. Let me ask you.

A. You are confusing me, because ordinarily the tax paid by a New York banking corporation in New York State is a franchise tax. The ordinary measure is based on [fol. 423] net income or net profit, as you want to phrase it. There are certain minimum taxes, minimum taxes in the case of savings banks being much more severe than the minimum tax in the case of stock banks.

Q. You are speaking of New York State?

A. I am speaking of the New York State franchise tax, yes.

Q. You said that amounts to about six percent per year, is that right, roughly?

A. It is four and one-half percent of net income, ordinary tax. If two percent of the amount of dividends distributed would exceed it, they have to pay that as income tax. We will assume they earn something like three percent after expense, and pay out two, that would leave them one percent to pay four and one-half percent tax on.

Q. Does a New York State savings bank pay any Federal tax?

A. Not at this point they do not.

Q. Do National banks?

A. I believe they do.

Q. You know they do?

A. I believe they do. I never saw one pay, but I believe they do.

Q. You know they are taxed on the same basis as a New York corporation?

A. That is right, same as State banks.

Q. You know what that amounts to, tax on the ordinary corporation?

A. The last I heard it was 38 percent of net profits, I believe, my best recollection. They raised it in the last half of last year. I think it was 45 percent for that particular period.

Q. It is now 45, plus excess profit tax, is that not correct?

A. That is correct.

Q. A commercial bank, National bank that is, which [fol. 424] makes considerable profit, might pay as much as 75, 77 percent?

A. I do not know what the probabilities of a National bank or commercial bank are of running into the excess profit tax. I am not too sure it is that easy.

Q. You would not be prepared to challenge my statement if it earned a sufficient amount it might pay a tax as high as 77 percent?

A. I do not challenge it, although my own opinion would be it would not run that high.

Q. It probably would not go that high?

A. No, it would not go much over the tax rate in my opinion.

Q. New York banks are obliged to pay a New York State income tax?

A. No.

Q. Franchise tax?

A. Franchise tax.

Q. Corporation?

A. Four and one-half percent of net income or net profits, whichever you want to use, a rather low minimum rate as minimum tax computed against capital. The point I am making is, the minimum tax is much less severe in the case of National banks and State banks than it is in the case of savings banks, although I think if you consult the records for these things you would find savings banks are paying a greater franchise tax in relation to their assets than are commercial banks in New York State.

Q. Something like one percent greater?

A. No, I think it goes many times greater because on a two percent rate of dividend so many of the savings banks are paying on a minimum basis; I mean that is available in the Tax Department reports, I don't know them off-hand. I have seen them.

Q. You said you had figures there. Will you tell us?

[fol. 425] A. You want to know the savings bank tax?

Q. Yes.

A. O. K. I will try to get it. I must apologize. We consolidated it in this book with other expense of operation, so I do not have it before me. That is a mis-recollection on my part. I am sorry.

Q. Can you give us the New York State rate?

A. Rate on what?

Q. Tax.

A. Franchise tax?

Q. Yes.

A. Four and one-half percent of net income, with dividends being allowed to be deducted as expense in case of mutual savings banks, minimum franchise tax at the rate

of two percent on amount of dividends paid; commercial banks, same general rate, four and one-half percent, of net income minimum I believe, computed against the amount of capital stock at a fairly low rate. I do not know the rate.

Q. Do you suggest that makes a good deal of difference between the tax paid by a State savings bank, mutual as you call it, and a National bank?

A. I suggest that the amount of tax in relation to the amount of assets collected by New York State as a franchise tax is considerably greater in the case of mutual savings banks than in the case of commercial banks, including National banks.

Q. In the case of the average bank of the same size, National bank, same size, or savings bank, same size, each making about the same profit, would not they pay approximately the same tax in New York State by way of franchise tax?

A. The difference of course is in the case of a mutual savings bank, the profit goes in effect to the depositors, [fol. 426] so that the amount is against the whole liability structure. In the case of a stock bank your profit goes down as against the stock, so that if you make one percent net profit over all, you come with a ten percent rate, if you have one of capital to ten of deposits. Ten percent.

The Court: Do you have any objection or motion to strike out?

Mr. Grimes: No.

The Witness: What I am trying to say is assuming you have a stock bank whose assets are supported by ten dollars of deposit and one dollar of capital, then if you make a net income equivalent to one percent of your assets that is a profit percentage wise in terms of capital, by the extent of the ratio of the deposits to the capital, or, if you made one percent over all on assets that would be the equivalent of ten percent profit to stockholders. In a savings bank you have no stock, so that if you have one percent profit on assets it is one percent profit in terms of owning depositors. Now, if you have a deposit growth in a savings bank, and choose to retain some portion of the earnings to margin off with surplus the deposit gain

in order to give you a secure asset position, that falls subject to the tax; in other words, to save one percent undistributed you get a tax rate against it, say one percent to stockholders it would only have to pay one-tenth of one percent earned on the structure as a whole.

[fol. 427] Q. Could you say in simple language what would the average New York State savings banks pay per year as contrasted with a National bank?

A. I cannot say, the figures are in the Tax Department report.

Q. It starts with four and a half per cent?

A. That is right.

Q. Each pays some comparatively small amount in addition?

A. No, the savings bank does not pay a comparatively small amount, not in addition, the alternative of the minimum tax is more costly to the savings bank, so that whenever the franchise tax falls on a minimum position the savings bank is comparatively less favorable.

Q. You don't mean to suggest a savings bank pays a basic rate of four and one-half percent plus something else?

A. No, I said it was alternative.

Q. Alternative tax was if you paid four and a half percent of something else?

A. On some lesser amount as a minimum.

Q. What is the maximum?

A. Four and one-half percent.

Q. So that is all it paid?

A. Or if the minimum would exceed it it would be the minimum.

Q. I mean, under a combination of figures, it is easy for the minimum to be close to the tax? The maximum is four and a half?

A. The maximum might be the minimum.

Q. What is the highest amount it could be in a year?

A. Whichever is greater, normal tax rate of four and a half percent on net income or the minimum tax of two percent on the amount of dividends paid.

[fol. 428] Q. Can you say there is any maximum on the tax in New York law?

A. It would be the higher of those two computations.

Q. So you have a choice?

A. They do not have their choice. Whichever produces the higher figure is the tax charged.

Q. That means a handicap to a national bank of 45 percent plus the excess profits tax?

A. I would have no earning position to express it. I would not challenge your statement if you said you thought the other was the greater tax burden.

Q. 45 percent plus something else is generally greater than four and a half percent?

The Court: It would depend on what the principal was.

Q. Depends on earnings, does it not?

A. Depends on earnings, yes.

Q. Both types of income tax depend on the acquisition of interest?

A. The New York tax is not an income tax, it is a franchise tax.

Q. It is based on income?

A. That is one of the measures.

Q. The other measure is the declaration of dividends?

A. The other measure is the minimum amount.

Q. Will you put down \$2,500,000 representing profits for a type of financial institution after all expenses are paid?

Mr. Rollins: I have made no objection. Unless there be any question about it, I feel this is collateral to the issue, tending to prolong the trial. I cannot see the relevancy [fol. 429] and I object to this line of questioning.

The Court: I think it is a debatable question whether or not it is relevant, but I think it ought to be taken. I should not want to risk the chance of refusing to allow the defendant to develop this comparative tax position of the two forms of institutions.

Q. Let us take two million.

A. No. I just mean that does not give odd figures to work with.

Q. Under that will you put two million dollars paid in dividends and subtract the second figure from the first?

A. I am using two million five hundred thousand.

Q. That would represent earnings?

A. That is our net income or net profit base.

Q. Net earnings, same thing. Will you figure up, assuming that is a State savings bank paying a State franchise tax.

A. Yes.

Q. Will you figure out both methods and state to the Court what the tax would be? What tax would be payable in New York on a four and a half percent basis?

A. That computation would show \$22,500.

Q. In making that computation you deduct two million dividend paid, a difference of \$500,000, multiplying four and a half, which makes \$22,500?

A. That is the computation on the basis of income, yes.

Q. There is an alternative basis, is there not?

A. Yes.

Q. Dividends had been declared and paid?

A. No. Wait a minute. You have said something with [fol. 430] which I do not agree. You are talking now about a mutual savings bank.

Q. Yes.

A. I say the minimum tax was two percent, amount of dividends paid. The example you gave me you had two million dividends paid. Two percent of that would be \$40,000, so under these hypothetical set of figures the savings bank owed the State \$40,000.

Q. I asked you to do it both ways, four and a half percent of net earnings, that is one method; that gave you \$22,500?

A. Right-o.

Q. Then having paid in dividends two million, it takes two percent of that, does it not, and that would be \$40,000?

A. Right.

Q. It must pay the maximum, is that correct?

A. Must pay the higher.

Q. Higher of the two?

A. Right.

Q. The higher of the two is \$40,000 in that case. Now will you take the same two million five hundred thousand of earnings after expense for a National bank, with two million dividends paid, two million, call that interest paid, that leaves you a net earning of \$500,000 does it not?

A. Right-o.

Q. Taking the minimum Federal income tax, it would be 45 percent?

A. Don't you take your State tax first?

Q. Take the State tax first then, if you wish to do so, and deduct it, will you?

A. Yes.

Q. What does that leave?

A. \$437,500 subject to Federal income tax.

Q. Use the minimum income tax, forget the excess profit tax?

A. 45 percent.

Q. Will you make the computation?

A. Subject to mathematical error it is \$196,875 tax.

Q. That is Federal?

A. That is Federal.

[fol. 431] Q. Will you add the Federal to the State, please, and give us the total?

A. Under this set of figures that produces a total tax of \$219,375.

Q. Against \$40,000 for a savings bank?

A. Under those figures.

Q. Hand those figures to the Court.

A. O. K.

The Court: Let us mark this in evidence.

(Paper received in evidence and marked Defendant's Exhibit V.)

The Witness: Now I will ask, let us assume——

Q. You are not permitted to ask me anything.

A. All right. Excuse me.

The Court: We have a question and the question is answered. The witness wants to make a correction in his answer, or amplification. State what you would like to do.

The Witness: What I would like to do is to say this: my answer was under some circumstances the tax would run higher in one case as against the other. Counsel here has given me a comparison set of circumstances under which the combined Federal income tax and State franchise will be greater than the State franchise tax for savings

banks. I could present another set of figures in which the result would be the opposite.

The Court: All right. That is a good enough state-[fol. 432] ment, and unless there is some objection I will let that answer stand.

Mr. Grimes: I have no objection.

The Court: Let the answer stand.

By Mr. Grimes:

Q. Are savings banks in competition with savings and loan associations in New York State?

A. The trouble with the question frankly is, what do you mean by in competition?

Q. In other words, is a dollar in someone's pocket likely to go into either, or do they battle against each other to get the same dollar from the same class of persons? There are many other forms where the same dollar might go, E bonds, investment trust, stocks. Are savings banks in competition with savings and loan associations? Are you unable to answer that simple question?

A. (No answer.)

Q. In other words, is a dollar in someone's pocket likely to go into either or do they battle against each other to get the same dollar from the same class of persons? There are many other forms where the same dollar might go, E bonds, investment trusts, stocks. Are savings banks in competition with savings and loan associations? Are you unable to answer that simple question?

A. What I want to know, what is the implication in competition?

The Court: All right. Stop there. He wants to know what is the implication of the phrase, in competition.

Mr. Grimes: I would like to ask him whether he can answer the question I asked. He can or he cannot, [fol. 433] one or the other.

The Witness: In the form, I don't know whether I can answer the question because I don't know what you mean.

Q. My question was, are savings banks in competition with savings and loan associations? Can you answer that question or are you unable to do so?

A. Do I have to answer that narrowly?

The Court: No. You can say unless something is defined you cannot answer it.

The Witness: Well, I mean I can answer it responsively, but not yes or no.

The Court: If you cannot answer it yes or no, just say so. He asked you can you answer that, whether he considers it a simple question.

The Witness: I do not consider it simple so I cannot answer yes or no to what I think would be our mutual satisfaction.

Q. What do you mean by mutual satisfaction? Can you answer the question at all?

The Court: Can he answer the question at all?

The Witness: Yes, I can answer the question.

The Court: He said he could answer the question, but he said he could not answer it categorically yes or no or in a short answer. He said that before.

Q. Let me ask you this. Are savings banks, New York State variety, in competition with National banks? [fol. 434] Can you answer that question?

A. Same answer as the other.

Q. Do you know any bank in New York that is in competition with any other bank?

A. Banks that are in the same line of business, same service, vie with each other to sell that particular service to the public that they think they might be interested in.

Q. Let me see if I understand you. One savings bank in New York State, City, say, might be in competition with another, is that right?

A. It might be, although by and large they are pretty well spaced.

Q. In other words, it might not?

A. That is right.

Q. Are you unable to state for instance, whether or not the Emigrant Savings Bank, New York City, is in competition with the East River Savings Bank? Have you formed an opinion on that subject?

A. In certain aspects, yes, other aspects, no.

Q. Is that one situation in which one savings bank might be in competition with another in the same community?

A. By reason of proximity, yes.

Q. By the same token it might not be?

A. Yes.

Q. You think one possibility or the other? You are not sure whether two savings banks in New York City are in competition with each other, is that correct?

A. No. They are in competition to a certain extent.

Q. When it comes to contesting or trying to get people's money in the institution would you say those two banks are in competition, or do you have doubt about it?

A. Competition can take the form of trying to sell [fol. 435] new customers, can take the form of trying to take customers away from another institution.

Q. Confining yourself to the question I asked.

A. Of new customers?

Q. No, competition, competing for people's money or deposits, are you able to form an opinion as to whether say the Emigrant might be in competition with the East River Savings Bank in New York?

A. Yes, it might be.

The Court: Why did you put it, might be? Is?

Mr. Grimes: He says it might be or might not be. I am getting to the point where he might venture an opinion.

Q. Can you state positively those two banks are in competition with each other for people's money, for deposit purposes?

A. They are in some competition, yes.

Q. Can you characterize the degree of that competition? Keen?

A. Not destructive, not trivial.

By the Court:

Q. Let me understand. Do you mean when you say in competition each institution is actively engaged in trying to acquire these deposits, or do you mean from the very nature of the institution and its name, located where it is, and in lower Manhattan, or just by reason of its presence and proximity of one to the other and the proximity of the two

to a large population of prospective depositors they are in competition? Which way do you mean it? In [fol. 436] other words, activity on the part of the institution, one trying to vie with the other?

Mr. Grimes: I meant the very nature of the business they are in, whether he is able to state whether they are in competition.

The Court: Without regard to any activity at all, just the location of the buildings, centered where they are with a large potential population of depositors.

The Witness: With that question I will answer yes.

The Court: On location he answers yes, but with respect to the activity, public relations department with each one.

Mr. Grimes: I did not include that.

The Court: That would be included in the question, unless you eliminate it, I would say, are they in competition with one another?

Mr. Grimes: Total field, that is what I meant. It could include, yes, I grant that.

The Court: He says now the location of the two institutions practically drawing from the same potential depositors in lower Manhattan, that naturally places them in competition one with the other. Have I over stated that?

The Witness: No.

By Mr. Grimes:

Q. So we have those two institutions in competition?

A. Yes.

Q. Will you say savings banks are in competition with savings and loan associations, if they are located in the [fol. 437] same general locality?

A. Yes, sir.

Q. They both compete for people's surplus money, do they not, to put in short blunt terms?

A. Yes.

Q. Commercial banks do likewise, do they not?

A. Yes.

Q. Is it not a fact commercial banks, State or Federal, and savings banks and savings and loan associations are

all in competition for people's surplus money, is that not true?

A. They are each offering their services, competing for the public's acceptance; if that is what you mean by competition, yes.

Q. They all advertise, do they not?

A. I think almost universally so.

Q. No doubt about that.

A. I could name one savings bank did not advertise.

Q. But practically?

A. I said universally, almost universally so.

Q. For instance, you know what the annual budget was in 1949 for New York State savings banks association for advertising purposes?

A. I do not.

Q. If I told you it was \$350,000 you would not be prepared to challenge that, would you?

A. Not offhand, no, sir.

Q. Would you be prepared to say millions of dollars are spent in the New York area by financial institutions for advertising purposes, directed specifically to obtaining the surplus money people have by way of deposits, investments or whatever you want to call them?

A. Well, I don't know the dollar figure, and, of course, a lot of advertising competes for other services than for the [fol. 438] deposit dollar; I would not challenge your statement, if you believe it is correct, in fact, it does not sound as if it would be impossible.

Q. Would you say at least a million dollars was spent for advertising in your opinion?

A. I am not saying at all, but I am not challenging yours.

Q. Savings deposits, in the general sense of the word, form a very important part of the total reserve of National banks, do they not? I believe your figures outside of New York City showed about a third, is that correct?

A. I would say in National banks about 15 percent of their total deposits are in time deposits in the form of passbook accounts; that is for National banks in New York State.

Q. That includes very large National banks of New York City, does it not?

A. That is right, and one of those supplies quite a bit of that figure, too.

Q. What are the figures you gave for National banks outside of New York City?

A. I did not give any for National banks. That was for State commercial banks.

Q. Do you have any figures?

A. I do not have a division in National banks between New York City and outside of New York City.

Q. Will you say that savings deposits for banks in New York State, National banks in New York State, outside of New York City, have in recent years run over fifty percent of their total reserves?

A. I would not believe it impossible. I have no way of knowing whether that is correct. It could well be.

Q. It could well be that high?

A. Yes.

Q. Assuming that to be the case, assuming it is over [fol. 439] 40, sometimes running beyond 50 percent, it is a fact, is it not, that savings deposits are very important to National banks, at least those outside of New York City?

A. You are making me use the term, or you are talking in terms of savings deposits.

The Court: You have to take that out of the question because that is the theory of their case.

Q. Is there any other term you suggest we use?

The Court: Passbook.

The Witness: Passbook accounts.

Q. Passbook accounts form a very important part of the total reserves of National banks outside of New York City?

A. I believe that is correct.

Q. You have no reason to question that at all?

A. Of course, they form part of the liabilities.

Q. Is their function to loan money?

A. Right.

Q. On which they hope at least to take in more income than their outgo?

A. Yes.

Q. The extent of their ability to loan money to industry or other groups is in direct ratio to their passbook deposits?

A. It is in direct ratio to the total deposits they have.

Q. Correspondingly passbook accounts are one element?

A. As one element outside of New York City.

Q. Do you know of your own knowledge, observation or experience as a person who has been in banking many, many years, that National banks located in the area [fol. 440] of Nassau County are in competition with savings banks in New York City?

The Court: For deposits.

The Witness: I would presume in the sense that many of the people who live in Nassau County work or go in to New York City, and hence might have an available opportunity to use New York City institutions, but you could say they were in competition in that respect.

Q. You do not have any doubt many deposits in New York City savings banks come from Nassau?

A. I have no data on it, I have no reason to believe people in Nassau County do not deposit in savings banks in New York City, Queens County.

Q. You know the number of savings and loan associations in Nassau County?

A. I do not. Most of them I believe are Federal.

Q. Quite a few are?

A. Exactly, I mean I would say there are probably twenty, anyhow. I do not know how far I may be off in that.

Q. When it comes to competition for people's deposits would you say National banks in Nassau County are in competition with savings and loan associations in Nassau County, whether those be State or Federal?

A. I would say they are each making an appeal for public money. Whether or not—

Q. Advertising?

A. Whether they are making the same appeal I mean, I do not want to hold that inherent in the question.

Q. There is no question in your mind that each is appealing for people's money?

A. On the basis of the service they have to offer [fol. 441] respectively, I mean in the same sense.

The Court: I think that is clear. We will take your testimony as a whole. One is a shareholder and the other is a depositor.

The Witness: Right.

The Court: They are both looking for money that is lying around?

The Witness: Right.

By Mr. Grimes:

Q. Would you say that competition is substantial?

A. I am not in a position to put an adjective on it, or an adverb, whichever it is.

Q. You cannot say whether it is substantial or not?

A. No. I mean, I do not live in Nassau County, I do not have access to, you know, the local papers in Nassau County, so I do not know the degree.

Q. Is there, I believe I asked you this before, but I would like to inquire just a little bit further, are not Federal savings and loan associations throughout the State paying as high as three percent on their investments?

A. They have some forms of share whereas if they are continued for a sufficient number of years, and dividends you know, currently paid, rather maintained throughout that period would produce it, but if you mean on the other hand does the average share in a Federal savings and loan get three percent, my answer is, I don't think so.

Q. Some advertise they pay it?

A. They have a class of share known as, I think they use [fol. 442] bonus share or installment share whereby if you make payment over a great length of period they vote an additional dividend, and with the two percent base dividend, if that additional dividend is one, that would work out to three and some odd advertised, that might be produced assuming the current scale to be continued, but I do not know any in Nassau County. I have seen some of the New York City ones.

Q. Would you say that type advertising is likely to attract people's money into that type institution as distinguished from a savings bank or a National bank?

A. I don't know frankly, because it might lead them to inquire, but whether or not it would attract the money I am not sure.

By the Court:

Q. That is just personal observation?

A. Yes.

The Court: He is just making a personal observation. I do not think he could tell us the state of mind of other people.

Mr. Grimes: I am asking him about practice, if he knows.

The Witness: Actual practice I do not think that Federal savings and loan associations get much money of that class where that higher rate is applicable. The bulk of their money is in shares other than that form of share.

Q. Is that something over two percent?

A. At three percent, as you suggested.

Q. What form of share are you talking about?

A. In the Federal savings and loan to the best of my [fol. 443] knowledge there are basically three types of share so-called optional share or savings share on which an amount may be put in at the option of—

Q. What rate of interest is paid on that?

A. Two percent generally.

Mr. Rollins: May the witness answer?

The Witness: Two percent is what I have seen most frequently on that.

The Court: What is your next classification?

The Witness: There is a classification whereby you put in a lump sum and agree to leave it for a certain time, they will pay you a little bonus above it, a little extra higher dividend above the two percent. The one you spoke about whereby—

By the Court:

Q. Third class?

A. Third class.

Q. Is that the one which you have been telling us about? I believe it is the share whereby you agree to make payment in installments.

The Court: We have that.

Q. Do those distinctions appear in ads which you have seen, or is it not a fact that most ads advertise a flat three percent?

A. So far as I saw those in New York State my recollection is it indicates that special conditions attach to it.

Q. You think based on your many years in banking, and am I correct in recalling your testimony was that you are [fol. 444] presently in charge of savings banks in New York State as Deputy Supervisor?

A. That is correct, we are divided functionally, and that is one of the functions that come under my deputyship.

Q. You have been a deputy for fourteen years?

A. Ten of those years I have had savings banks.

Q. It has been your job to watch them?

A. Correct.

Q. And supervise, is that right?

A. Yes.

Q. You supervise passbook accounts, do you?

A. I have no preference. I am trying to use the term that is common to all and indisputably common to all.

Q. Savings banks have passbooks?

A. Yes.

Q. National banks use passbook accounts?

A. They use passbooks, yes.

Q. How about savings and loan associations?

A. They use a form of book to record a share transaction, too.

Q. State commercial banks use passbook accounts?

A. Yes.

Q. Each account pays interest, does it not, at the present time?

A. Pays interest.

Q. Or pays—

A. (Interrupting.) Interest or dividends.

Q. Pays something to the depositor?

A. That is right, interest or dividend.

Q. Interest, or what they call dividends.

A. I think we are referring to passbook accounts, are we not?

Q. A time deposit is a term considerably broader than passbook account?

A. Yes.

Q. Is there any substantial difference between these various types of passbook accounts from the standpoint of the banking institution and from the standpoint of [fol. 445] the person, a member of the public who uses that service?

A. Do you mean—

The Court: I think you would have to refine that question to something. A little too broad. The witness would have a very long answer to make to that.

Q. From the standpoint of the financial institution itself, and from a member of the public who has surplus funds and wishes to put them away some place and get a return on it, is there a substantial difference between a passbook account in a commercial bank and one in a savings bank?

A. There is some difference to the incident. It might be very important to the particular person.

Q. You make a real distinction between those types, do you?

A. I make this distinction, if you will permit me. I mean, in a savings bank you have a mutual institution, you have that almost as the sole source of raising funds, I mean they have club accounts which are minor on top of the passbook account, so that you have them devoted exclusively really to serving savings accounts in passbook form; that is their one big stock in trade day in and day out, that is really the only public funds they can attract in that form, and they have no other object, real one, than to keep the funds invested safely and to pay the maximum rate of distributable earnings that can be safely produced. In the commercial bank there is not a similar restriction around the assets to which the funds might be invested, there may or may not be the same continued interest in passbook accounts, and is the possible conflict of interest between stockholders as between paying the highest rate can be safely produced or a rate they think is necessary to hold that type of business, and you have your background of history and tradition what it means to

a person, what their representations mean in publications, who has been in business longest. That is the consideration. I do not know what you want in the way of an answer beyond that.

Q. You know commercial banks are permitted by law to keep savings deposits, do you not?

A. I know there is reference in the National statutes to savings deposits. I do not know whether there is direct permission or not.

Q. You do not have any occasion to challenge my statement.

A. I am not a lawyer. I would not challenge whether they have that power or not.

Q. They may do so?

A. I have not read that particular portion.

Q. Has it ever come to your attention that the Federal Government refers to them as savings deposits?

A. That is correct. I know there are definitions of savings deposits applicable to commercial banks, members of the Federal Reserve system.

Q. You recognize these documents here as public documents furnished by the Federal Reserve Bank, that is one of the Second District, do you not?

A. They look very familiar; the same thing we get, very familiar. I do not dispute it at all.

Q. You recognize these as authentic documents?

A. I would say so. I think they are.

The Court: Are you not asking the witness to go a little far there. He does not know whether they are [fol. 447] authentic or not. It is like things that were sent to him. He is stating you are handing him something Federal. If they are authentic copies promulgated by the proper department of the Federal Government, I shall receive them in evidence, whether this witness says they are right or how right.

Mr. Grimes: I offer them.

Mr. Rollins: I object. It is not under the—unless the documents have been filed with the Federal Registrar.

The Court: You can object to the competency.

Mr. Rollins: As hearsay.

The Court: If you want to say I object, I must sustain

the objection. You cannot put a report or regulation of that kind in evidence just by handing it to the Court, but counsel I have the utmost confidence could produce here a witness to make that competent, if he is required to do it.

Mr. Rollins: What is that intended to prove?

The Court: Mr. Grimes thinks these two public documents are important to his case. You both are trained lawyers. He should hand them to you and if you think they ought to be objected to on the ground of relevancy or materiality you should do it. If you think they should be objected to because they are not competent, the proper thing to do would be to confer with Mr. Grimes and find out the origin, and not just force counsel to bring someone here [fol. 448] from the Banking Department with the originals. That is the only difference. If the originals were here, provided they are relevant and material I would receive them in evidence.

Mr. Rollins: In the first place, they are incompetent, irrelevant and immaterial to the issues in this case, and secondly, they are attempting to establish an opinion expressed possibly on the main issues, whether the statute involved—

The Court: You do not have to go any further.

Mr. Rollins: Objected to on the ground they have not been published in the Federal Registry, therefore any regulation therein stated cannot be admissible in evidence.

The Court: All you have to say is, they are incompetent. I sustain it. You will have to come to some agreement yourselves. Nothing like that is competent when there is an objection.

Mr. Rollins: I will not challenge the veracity.

The Court: That will not do unless you say you object on the ground the paper, not being competent. I cannot take the printed copy when an original exists somewhere. Let him pass on to something else. The objection is sustained.

By Mr. Grimes:

Q. Showing you these documents, which I will ask to [fol. 449] have marked for identification at this point.

(Two papers marked Defendant's Exhibits W and X for identification.)

The Court: Hand them to the witness.

By Mr. Grimes:

Q. Will you state whether or not—let me see the two documents—

The Court: I think you are questioning the wrong man. He says he does not know anything about these Federal matters. You are going to call some Federal bank officials here. Why not leave it to them.

Mr. Grimes: He says he does recognize them and State banks were under supervision and they get these.

The Court: All he is doing is looking at the printing on the outside and he recognizes that.

By the Court:

Q. Is it a fact you are familiar or unfamiliar? I do not even know what these are, regulations of the Federal Banking Department?

A. These I presume are regulations of the Board of Governors of the Federal Reserve.

Q. Are you familiar with them?

A. I have seen them from time to time. You mean do I know they were properly created?

Q. Yes.

A. No.

The Court: That is an answer.

[fol. 450] By Mr. Grimes:

Q. Have you ever seen the passbook accounts of a National bank referred to in the National Banking Act or Federal Reserve Act, or in the rules and regulations or reports or bulletins of the Federal Reserve system or the Board of Governors thereof as anything other than savings deposits?

A. My best recollection is, wherever I have seen that kind of account described it has been in connection with the definition of savings or time deposits.

Q. My question is, have you ever seen any other word used to describe the same function?

A. Time deposit is the answer.

Q. Time deposit or savings deposit, is that right?

A. Yes.

Q. A time deposit includes a savings deposit, is that right?

A. Yes.

Q. When they meant savings deposit as distinguished from time, have you ever seen any words used other than savings deposits?

A. I don't recall.

Q. You are familiar with Section 258, subdivision 1, are you not?

A. Yes.

Mr. Rollins: New York State Banking Law?

The Court: Yes.

Mr. Grimes: Yes.

Q. Would you say a thrift account is the same as a savings account?

The Court: In what respect?

[fol. 451] Q. In the matter of terminology?

A. I would not say.

The Court: Just a minute, now. You would have to have that question directed to one or another group. If you are talking about from the point of view of a bank, that would be one thing. If you are talking about from the point of view of the public I do not think he can answer.

Mr. Grimes: I am talking about the statute, and these various words that are used.

The Court: He cannot interpret the statute. I am not going to permit him to do that.

Mr. Grimes: Difference between direct and cross examination?

The Court: Yes. Unless it is to challenge his statement on direct I do not think it would be proper to ask the witness to interpret the language of a statute. When you ask him whether there is a difference between those two terms of deposit accounts, you would have to refine that as to just

exactly what group it had application to. The witness could not very well answer. If you mean just his own personal view, I do not think we ought to take that. I have excluded that from those other witnesses.

Mr. Grimes: Very well.

By Mr. Grimes:

Q. In your observation in connection with your position you have visited many banks, have you not?

A. A considerable number.

[fol. 452] Q. You have knowledge as to whether or not banks are asked by the Treasury Department of the United States Government to participate in United States Savings bond drives?

A. Yes, they are asked to participate.

Q. Do they do so?

A. Yes.

Q. Do you know of a-y bank that refuses to do so?

A. I know of none.

Q. State banks as well as National banks have done so?

A. Yes.

Q. They are also asked, all banks, are they not, to display signs in connection with putting on a drive to sell United States savings bonds?

A. Signs, poster, yes, sir.

Q. You have seen a number of them, have you not?

A. Within banks?

Q. Yes.

A. I have seen a number, not too great a number.

Q. By the way, are you familiar with Federal Reserve forms?

A. Which form?

Q. Comptroller of the Currency rather, Comptroller of the Currency form say 21-29?

A. That is right, Federal Reserve form.

Q. Comptroller of the Currency, earn dividends, are you familiar with that form?

A. Not that form, because that is a National bank form, although I do not think it differs greatly from the ones used by New York State for commercial banks, except as to terminology, or from those used by the Federal Reserve

Bank, but that particular form I do not have reason to see, the Comptroller's form.

Q. Have you ever seen one?

A. I have never examined one, no.

[fol. 453] The Court: How much longer will you be with this gentleman? I thought we could finish with him.

Mr. Grimes: I expect to finish in just a few minutes.

Q. Do you recognize this document as a Treasury Department advertisement for savings banks?

A. I would assume it is that. It looks very familiar, I say, it looks like it, very familiar to me. I assume it is issued by the Treasury Department.

Mr. Grimes: I ask it be marked in evidence.

The Court: Mark it.

(Received in evidence and marked Defendant's Exhibit Y.)

Q. Have you, in the course of your official duties observed many such placards as Defendant's Exhibit Y in National banks?

A. I don't recall seeing any in National banks because I do not go into National banks.

Q. Have you seen them in State commercial banks?

A. I would not guarantee I did.

Q. You do not know whether you have or not?

A. No. About the only commercial bank I get in is the one I bank in. I don't recall seeing it there.

Q. Do you know whether those signs from any source, such signs are displayed in National banks?

A. I have no reason to dispute they are displayed in National banks, State commercial banks or savings banks.

[fol. 454] Q. Let me ask you this. You know National banks have a duty to sell bonds?

A. They are fiscal agents for the United States Treasury.

Q. You know that as an expert on banking?

A. I know that from my recollection generally of the banking laws.

Q. They were established in 1863?

A. I know.

Q. That is right?

A. That is correct.

Q. This is a regular function, to sell Government bonds, acting as fiscal agent of the United States Government?

A. Yes.

Q. You know National banks, or do you know, are paid a service fee for the redemption of the sale of savings bonds?

A. I know there is a fee paid and I assume it is similar to any institution, whatever it be, savings bank, commercial bank or National bank.

Q. When a National Bank advertises United States bonds, sells them, acts as fiscal agent in the sale or redemption and receives a fee for doing the same would you say they are using the word, savings, in connection with their banking business?

A. No.

Q. You would not? That is not a use of the word savings, in connection with the banking business of a National bank?

A. Those funds go to the United States Treasury, don't they?

Q. Are you giving your answer? You see the use of word savings, United States savings bonds?

A. Yes.

Q. A National bank displays that sign?

A. Yes.

Q. It sells savings bonds for the Federal Government?

A. And gets a fee.

Q. Redemption deals with the public. On that [fol. 455] basis do you say that is not a use of the word, savings in connection with a National bank business?

A. Not in their bank business.

Mr. Grimes: I do not have any further questions of this witness.

Q. Do you plan to remain in New York State service?

A. I have an offer from a Manhattan Savings Bank to become its vice-president and secretary. That I intend to accept as of tomorrow.

By Mr. Rollins:

Q. Do you want to add anything else to what you said?

A. No.

Q. By way of explanation or addition?

A. Not on that.

Q. What you testified on?

A. No.

Mineola, New York,
February 1, 1951

(Trial continued.)

The Court: Let us see where we were. We had called a witness out of order, had we not?

MOTION TO DISMISS COMPLAINT AND RULING THEREON

Mr. Grimes: If your Honor please, the witness of yesterday, Mr. Ludemann, having been called on the direct, I renew the motions previously made to dismiss.

The Court: I will make the same decision. Now we are on the defense and ready to proceed.

Mr. Grimes: Mr. Brumbach.

[fol. 456] RICHARD BRUMBACH, residing at 705 Lincoln Boulevard, Long Beach, New York, called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Mr. Brumbach, what is your occupation?

A. I am an instructor in the Psychology Department at Hofstra College.

Q. How long have you held that position?

A. Since September 1950.

Q. Is there also in that college what is known as the Psychological Workshop?

A. Yes, there is.

Q. What is your connection with the Psychological Workshop?

A. I am the Associate Director of the Psychological Workshop.

Q. Who is the Director?

A. Doctor Chappell.

Q. Who has testified here?

A. Yes.

Q. Now would you state briefly what your education has been.

A. In 1936 I took a B.S. in sociology from Columbia University, and in 1940 I got an M.A., Master's Degree, in sociology, at Columbia.

Q. What work have you done since that time, starting with 1936, if you worked during the period while you were studying for your Master's degree?

A. Well, from 1936 until 1940 I worked for the New York City Department of Public Welfare.

Q. What sort of work?

A. I was at one time a social investigator, and later I was a community relations interviewer. That is a job of meeting with various community groups that want to discuss the Department of Welfare regulations.

[fol. 457] Q. Go ahead, please.

A. From 1940 to 1945 I worked for the Community Service Society in New York City as a psychological case worker.

The Court: Is that a municipal organization?

The Witness: No, that is a private foundation.

A. (Cont'd) On that job I did case studies which were very intensive studies based on a small number of respondents, fifty to a hundred very intensive interviewing.

Q. Your field up to that time, at least, had been in the psychological field, is that correct?

A. Right.

Q. Proceed, please.

A. From 1945 until last September, 1950, I worked for Alfred Politz Research.

Q. What do they do?

A. They are a market research firm.

Q. What sort of work did you do there?

A. Well, my title there was field supervisor, which meant that I would work with a client in developing the problems that they wanted investigated, writing the questionnaire, testing the questionnaire out on a small number of re-

spondents before it was put into the field. I would work with the sampling department in deciding what the sample design was going to be, train the interviewers, I would be in charge of the analysis of the returns or results after the interviewing had been done and then would write the report.

Q. Does Politz do work for well-known concerns?

A. Yes, quite well known.

[fol. 458] Q. Could you name a few, please, and the type of work that Politz did for them.

A. One of our clients that I worked with was Socony Vacuum Oil Company. We did a number of jobs for them in reference to the type of gasoline and oil that motorists would buy, what sort of things they were looking for when they went into a station to buy oil, what factors influenced their decision to buy a particular brand of gasoline or a particular brand of oil. I worked on a survey for du Pont where we had observers in gasoline stations who would watch motorists when they came in to buy anti-freeze and would keep a record of everything that the motorist had done at that time—whether he had asked for the anti-freeze by brand, whether he knew what particular brand had gone into his car—

The Court: You can stop there. I think you have exhausted that subject now.

Q. You did other-like jobs for well-known concerns, is that right?

A. Yes.

Q. And these jobs, is it fair to say, involved knowledge, preference opinion and a wide variety of public attitudes in regard to a specific product or service; is that correct?

A. That's right. I also did surveys that had to do with the public's knowledge.

Q. Could you illustrate that type, please?

A. I worked on a survey for the Rolled Gold Platers Association, who wanted to find out how much knowledge the public had of terms that were used in the trade to describe gold-plated jewelry. There were several terms—gold-filled, gold-plated, rolled gold plate—and their desire in that [fol. 459] particular survey was to find out how much the public knew and understood of those particular terms.

Q. Would you state briefly what the work of the Psychological Workshop at Hofstra College is.

A. We are doing surveys in the market research field. Our work largely we think will be in the direction of studying methodology or developing new methods of doing surveys.

Q. With the idea of improving them?

A. That's right, yes.

Q. And you are constantly working on that subject?

A. That's right.

Q. Very briefly, please, has Hofstra College for some period of time been interested in that field? I refer to the survey field.

A. Yes, they have.

Q. Could you name a few of the notable surveys that have been done by Hofstra College?

The Court: Just the names of customers or clients, whatever you call them.

Q. And perhaps, if his Honor permits, just a very brief description.

A. They have done two—we have done—well, the workshop has done two rather large surveys for the National Broadcasting Company, both of them in reference to television. The first one was a comparison of television and nontelevision homes for several characteristics. The last one that was done was designed to study the effectiveness of various types of television advertising and the appeal of different television programs.

Q. Those surveys both involved public knowledge and public preference, is that correct?

A. Right.

[fol. 460] Q. You have been in court during the testimony of Doctor Chappell?

A. I have, yes.

Q. Did you work upon the Hofstra survey of certain banking terms, of which there has been much testimony in this case?

A. I did, yes.

Q. Did you have charge of a certain branch of that survey? When I say "have charge," I mean did you take over and do most of the work of a certain branch of that survey?

A. Yes. I worked with Doctor Chappell from the beginning in all aspects of the survey, but there were some parts of it in which I did more work than others.

Q. Specifically, on the calculation side, would you state to the court what you did in reference to that?

A. Yes. When the questionnaires were returned from the interviewers, I was in charge of seeing that they were accurately tabulated in order that we could get the final results of the 928 interviews that we had made.

Q. Did you do so? Did you make the tabulation?

A. Yes, I did.

Q. Was the tabulation accurate?

A. It was, yes.

Q. Do you have the tabulation sheets here?

A. They are on that blue folder.

Q. I show you a batch of papers and ask you whether those are the tabulation sheets which you worked up.

A. Yes, these are the tabulation sheets.

Q. Those comprise all of the final tabulation sheets, is that correct?

A. That is correct.

Q. Those tabulation sheets accurately set forth the results of the tabulation of the answers given on all of the questionnaires, is that correct?

A. That is correct.

[fol. 461] Mr. Grimes: I offer them in evidence, your Honor.

Mr. Rollins: If the Court please, I object to the receipt of these sheets in evidence, upon the ground they are incompetent, irrelevant and immaterial.

The Court: Make it the same objection.

Mr. Rollins: And particularly upon the ground that they violate the hearsay rule. But that is not by way of limitation of the other objections.

The Court: No. The same objection—let it be as broad as possible—and the Court will overrule it.

Mr. Grimes: These are offered as one exhibit.

(12 sheets received in evidence and marked Defendant's Exhibit Z.)

Q. I observe from Exhibit Z that a number of classifications are involved in connection with the answers. Will you explain to the Court how those classifications were made up?

A. Yes. The first question in the questionnaire is asking the respondent, or the person being interviewed——

The Court: Use "respondent"; that is good.

A. (Cont'd) ——respondent, after the introductory statement, "Will you please describe what each of the following services is," and there was, of course, a tremendous variety of answers to that question.

[fol. 462] The Court: What following services were they? Read them just so they will be in the record.

The Witness: The question continues: Savings account, compound interest account, special interest account, and thrift account. In response to the question about each of these four accounts there was a wide variety of answers, and those answers were——

Mr. Rollins: If your Honor pleases, I do not think the answer is responsive to the question made. I think the witness is now going to attempt to say what the results were of the survey, and if that is the purpose——

The Court: That ought to be in a single question, I think.

Mr. Rollins: If that is the intent of the question, your Honor is permitting the witness to testify along those lines and I am going to interpose an objection upon the ground that it is violative of the hearsay rule and upon the ground that same is incompetent, irrelevant and immaterial to the issues in this particular action.

Mr. Grimes: My question, sir, does not yet call for the answer.

The Court: Your question was, Did you tabulate? Isn't that it?

Mr. Grimes: Yes, and to explain the classification, but my question does not yet call for the results.

The Court: He really is coming to results.

[fol. 463] Mr. Grimes: I simply want him to explain the method of classification and what the problem was without yet giving the results. We will put the results in.

The Court: Why not embrace results? I think you could

do it quickly. You would have it right in front of you, would you not?

Mr. Grimes: There are one or two other stages and then we will have results.

The Court: All right, do it your own way.

Mr. Rollins: I thought the witness was going to do that, from the language he was about to use or was using.

The Court: I would think, Mr. Grimes, that for the purposes of your record it would be a more impressive record if this gentleman gave us a narrative of just what he did, which I think will answer your questions. I will let him answer what he did.

Mr. Grimes: Yes, that is really what I want. There is no difference.

The Court: Then he will say he made these classifications, and so on and so forth. Now would you like to amend your question to read that way? State what you did with respect to this poll.

Mr. Grimes: Yes; yes, indeed.

The Court: All right. That means give the whole story, results and everything else.

Mr. Rollins: You mean your Honor is going to permit his conclusions based upon Exhibit Z in evidence?

[fol. 464] The Court: Yes, and we will add to it. State your conclusions with respect to what you did, so there will be no doubt about it.

Mr. Rollins: If your Honor pleases, I object to the answer intended to be elicited by the question, because it calls for an opinion of this witness to be based upon evidence which is purely hearsay, and upon the further ground it is incompetent, irrelevant and immaterial.

The Court: I will overrule the objection.

Mr. Rollins: May I call your Honor's attention to the Court of Appeals ruling in *People v. Keough*, 276 New York?

The Court: Of course, you are right, it is hearsay.

Mr. Rollins: I gave that case to your Honor on the yellow paper. There an alienist was permitted to testify—

The Court: This I regard as entirely an exception to the hearsay evidence rule, and if there never was any authority for it, it would be my idea to consider making it proper

evidence. Whether I will or not will depend upon what you gentlemen—

Mr. Rollins: Because this violates all known concepts of expert-opinion ruling in New York State, and as I say, the Court of Appeals in that case, 276 New York—

The Court: Let us not go into that. I am going to give you the fullest opportunity to try to convince the Court that I should receive none of this evidence, and by the same [fol. 465] token I am going to give Mr. Grimes the opportunity to establish that I should make an exception to the usual hearsay evidence rule and be guided by this evidence. But that is something that I will do later on. Now I want to make the record.

Mr. Rollins: Moreover, even if your Honor received it in evidence and found it to be proper in the first instance, how much credence your Honor is going to attach to it is another proposition.

The Court: That is right. If I receive it, then I consider the weight of it. However, I think we are all ready now.

Mr. Grimes: Judge, may I just explain this—I think it will clear the issue—that there are several other documents I think properly belong in evidence prior to an expression by him of his opinion, and I am trying to bring them in one by one. I do not want to depart at all from your Honor's suggestion, but I conceive that we are not ready for the conclusion or the final tabulations. There are two other sets of documents, one being the standards by which he judged.

The Court: Would he not come to that in his narrative?

Mr. Grimes: I am not sure. He should. But, after all, it is up to lawyers to guide, I think.

The Court: That is right. Let me make myself clear. The only suggestion I was making, Mr. Grimes, was that [fol. 466] there are always two ways of doing this kind of thing. One way is to set out each little classification; the other would be to have a straight narrative and, as the witness comes to the beginning of a classification, you hand him the exhibit that supports his next testimony and he goes on and you have your exhibit before the Court.

Mr. Grimes: Very well, sir. I am trying to do both, present it both logically and chronologically, and I think if I

may be permitted to proceed, since I have a scheme in mind, we can proceed without delay and it will really shorten the discussion in the long run.

Mr. Rollins: May I also urge as an objection that expert opinion may only be rendered upon a hypothetical question and an assumption of facts in evidence, upon the assumption that the report is true?

The Court: Mr. Rollins, make that in your final motion to strike out. It is not any stronger here than it will be then, and you will have more time to make it more emphatic.

Mr. Rollins: An expert cannot render an opinion, if your Honor please, except on his personal knowledge or upon a hypothetical question upon competent evidence in the record.

Mr. Grimes: This is personal knowledge.

Mr. Rollins: He is stating a conclusion based upon nothing here except that he looks at sheets and says, "That's my opinion." But he is not taking into consideration [fol. 467] that what he has read and what he has calculated is true.

The Court: That will be something for you to argue when you move to strike out, and I will give it consideration. Go ahead.

Q. Did you have certain standards by which or upon which you based your classification?

A. I did.

Q. And those were in the form, were they, of definitions as to various types of accounts about which persons were questioned?

A. That's right. They are marked coding, codes.

Q. I show you a document and ask you whether this document sets forth the standards by which you judged the questions and recorded them in your calculation sheets.

A. These are the definitions that I used.

Mr. Grimes: I offer that in evidence.

Mr. Rollins: I object to it. Whose definitions are they? If your Honor please, I object unless it is from a standard work, Webster's, or some other individual of recognized note. He said that is the standard he used. That is no proper basis of definition unless it comes from a source—

The Court: I will receive it in evidence. No matter what it is, that is what he used. No matter what it is, even if it is wrong, that is what he used.

(Received in evidence and marked Defendant's Exhibit AA.)

[fol. 468] Q. You stated that the answers to the questions asked were of a very considerable variety, did you not?

A. Yes.

Q. Did you make for the benefit of the Court a classification which includes under classified headings all the answers given to all of the questionnaires?

A. That is right. Each of the 928 answers to each question was classified, as you will later find them in this report.

Q. I show you another batch of documents and ask you whether that is the classification referred to.

A. This is a listing of how the answers were classified, the actual answers in the classification that was made.

Q. So, every answer given in the entire survey to every questionnaire which is now in evidence is listed here under the classifications which you made, is that correct?

A. Those are the listings for the question, "Will you please describe what each of the following services is: Savings account, compound interest account, special interest account, thrift account."

Q. That is the first?

A. First question.

Q. What will become the first table—the first question?

The Court: Your answer is yes?

The Witness: Yes.

The Court: The answers to every question in the questionnaires which are in evidence here were classified by you under some heading as it appears in that coding, is that what you call it?

The Witness: Well, there is a slight distinction here.

[fol. 469] The Court: Tell us what it is.

The Witness: It is the listing of every answer in response to the question, "Will you please describe what each of the following services is: Savings account, compound interest account, special interest account, thrift account." Now, in

the questionnaire there were other questions asking what—

The Court: We know that there were two other questions.

The Witness: That's right. The answers to that are not listed in this document.

The Court: No, that is just the definition listing there.

The Witness: Right.

The Court: But Mr. Grimes's question, to which I think you answered yes—but I know he wants the answer—By the way, what do you call that which Mr. Grimes holds in his hands now—classification something? Classification report? What would it be? Let us get a name for it.

The Witness: It is a classified response list of every answer.

The Court: The classified response list. Now his question was: Does that contain the answer of every person interviewed set up in classifications in which, your judgment prompted you to determine, those answers belonged?

The Witness: It does, yes.

The Court: That was what you wanted, was it not?

Mr. Grimes: Yes, yes.

[fol. 470] Q. And your answer is confined to the first question?

A. The first question, yes.

Mr. Grimes: I offer these in evidence.

Mr. Rollins: It is objected to upon the ground they are incompetent, irrelevant, immaterial, and violative of the hearsay rule.

The Court: I will receive them in evidence.

(Received in evidence and marked Defendant's Exhibit BB, being 22 stapled groups.)

Mr. Rollins: May I also state that by indirection that exhibit tends to express an opinion without the hypothesis that the statements upon which the conclusion is based therein are true.

The Court: That will be considered as part of your objection. The Court overrules the objection.

Q. Did you also make a tabulation in numbers form of all of the answers given to all of the questions?

A. I did.

Q. Do you have that before you?

A. This set of work sheets includes every question in the questionnaire.

Q. Then did you make a table from that?

A. I did, yes.

Q. In fact, you made a number of tables from that, did you?

A. Yes.

Q. And you have them before you?

A. I do, yes.

[fol. 471] Q. Would you state what they are by description without yet reading the results into the record, beginning with the first table.

A. Each of the tables?

The Court: You can do that quite briefly. Are they reflective of your work sheets?

The Witness: These tables as typed in the report are an accurate reflection of the tabulations that we made from the 928 questionnaires.

Mr. Grimes: Now I offer those tables in evidence. If your Honor please, there is a document which I would rather not break down, and I intend to offer all of it. The written portion has a summary of Doctor Chappell's testimony. At the moment I am merely offering the tables through this witness.

The Court: Are they certain pages?

Q. Will you state where the pages begin and where they end?

Mr. Rollins: If your Honor please, I object to the offer of evidence.

The Court: Wait. He has not answered yet.

A. The tables in the report are pages 14 through 34.

The Court: That is what counsel is offering in evidence?

Mr. Grimes: That is correct.

[fol. 472] The Court: You make the same objection to that?

Mr. Rollins: I make the objection upon the ground that the offer of this in evidence violates the hearsay rule and

upon the further ground it is incompetent, irrelevant and immaterial.

The Court: I will overrule the objection.

Mr. Grimes: Perhaps your Honor would like to examine that now.

Mr. Rollins: May I also be permitted to urge an objection. I note there is an opinion expressed in Exhibit CC. It is a conclusion based not upon the knowledge of this witness but upon matters dehors the record and without the hypothesis of any factual statement to justify the conclusion which appears in the record here, in accordance with the principle enunciated in *People v. Keough*, 276 N. Y. 141 and in *People v. Harris*, 136 N. Y. 423.

The Court: I will overrule the objection.

(Received in evidence and marked Defendant's Exhibit CC, being pp. 14-34 thereof.)

Q. Now, Mr. Brumbach, in your opinion, based upon your experience and based also upon the calculation work you did and every item thereof, are the percentage figures reflective in Defendant's Exhibit CC, being pages 14 through 34, of a brochure in evidence, accurate percentage figures representing the answers given by the respondents as a result of the interviews in the survey to which you have referred, each being a percentage figure under a described classification? Are those correct?

Mr. Rollins: I object to it, if the Court please, upon the ground it violates the hearsay rule and it is an expert opinion sought without a hypothetical question based upon relevant and competent matters in evidence, and assumption of the truth thereof.

The Court: I overrule the objection. Answer.

A. They are.

The Court: Let us get one more question, Mr. Grimes. Retain what you have in mind. (To Witness:) The question asked of you before was, Were the entries on that table, pages 14 through 34—Exhibit CC—reflective of the work sheets which were received in evidence? Now let us go back a little further. Are those work sheets reflective of

what you read on the questionnaires which are also in evidence?

The Witness: The work sheets are reflective of the 928 questionnaires, and the results from the work sheets are accurately reflected in the report, pages 14 through 34.

The Court: All right. That connects it.

Q. Now as to the method used in this survey, based upon your experience, your reading, your study of [fol. 474] the various methods by which public knowledge can be ascertained, will you express, please, to the Court your opinion of the methods used in this survey and the accuracy thereof?

A. I think that the methods used in this particular survey are the most reliable that we could use, and that the findings or results on pages 14 through 34 are an accurate reflection of the degree of knowledge of the persons in Nassau County in reference to the questions that we asked them.

Mr. Grimes: You may inquire.

Mr. Rollins: If your Honor please, I move to strike out the last answer, upon the ground that same violates the hearsay rule and that the conclusion reached by this witness is not based upon a hypothesis of any matters in evidence, competent matters, or as to the truth thereof, without the assumption as to the truth thereof.

The Court: I will overrule the objection.

Mr. Rollins: I could not have made my objection before because no question was asked as an expression of opinion but was an opinion expressed by reference in a document in evidence.

The Court: All right.

Mr. Rollins: That is the reason I had to move to strike out the answer.

Cross-examination.

By Mr. Rollins:

Q. Is your title "Professor" at the college, sir?

A. No, I am an instructor.

Q. You say you have a Psychology Department in Hofstra College?

A. We do.

[fol. 475] Q. And as a division thereof you say you are developing or attempting to perfect sample polls; is that what you told the Court?

A. No. We have a Psychological Workshop, which is not actually a part of the Psychology Department but is a separate division of the college.

The Court: The word was not "perfect" but "improve."

Q. Improve. You were trying to improve the Psychology Department, is that it?

The Court: No, the taking of polls.

Q. Polls?

A. The methodology in—

Q. Isn't sample polling or polls as we generally understand them today a matter of statistics under that particular subject?

A. There is an element of statistics in all surveys.

Q. Does not the study come under the subject of statistics?

A. I wouldn't think so, not completely.

Q. Take that poll that you said you worked in for the Socony Vacuum Oil Company. Your attempt was to discover the reaction of the public to a product manufactured and distributed, or rather I should say refined and distributed, by Vacuum Oil Company, isn't that right?

A. That's true.

Q. And that was an anti-freeze?

A. The one for Socony Vacuum Oil Company was gasoline and oil.

Q. That anti-freeze you were talking about is an oil, is it, a lubricant?

A. No, the one on anti-freeze was done for the du Pont Company.

[fol. 476] Q. What product did you inquire about of the public on the Socony Vacuum Oil?

A. Gasoline and motor oil.

Q. They have a standard brand of their own, have they not?

A. They do.

Q. What is the name of that?

A. Mobilgas is their gasoline and Mobiloil——

Q. Did you have your men there go to the stations using the product of Vacuum Oil?

A. No. We had our own men go to a sample of the population as a whole.

Q. But when you had these people at these gas stations, did they go to the competitors of Standard Oil or did they go to the stations using Standard Oil products?

A. You are confusing me because you are taking two different subjects and asking questions.

Q. All right. You wanted to discover sales resistance or the knowledge of the public dealing with products dealt in by the Standard Vacuum Oil Company, is that right?

A. Yes.

Mr. Grimes: I think Vacuum Oil is different from Socony.

Mr. Rollins: Socony Vacuum, Standard Oil, it is the same thing, is it not? Standard Oil Company operates Vacuum Oil, isn't that right?

The Court: (To Witness:) Do you know that?

Mr. Grimes: There is a Socony Vacuum.

The Witness: No.

The Court: Just say you do not know.

The Witness: I wouldn't know.

Mr. Rollins: We all know Standard Oil Company [fol. 477] of New York is Vacuum Oil Company.

Q. Let us take Socony Vacuum Oil Company. They sell products to——

The Court: Really, it does not make any difference to the question.

Mr. Rollins: It makes no difference.

Q. They sell petroleum products, is that right?

A. Right.

Q. And they were naturally interested in the marketing of their product, is that correct?

A. Right.

Q. And the reaction of the public to their specific products or that of their competitors?

A. Both.

Q. In other words, you placed your men at gasoline stations, is that right?

A. No.

Q. Where did you place your men to discover that?

A. Went out and interviewed in homes.

Q. Did you not tell the Court that you placed men around gasoline stations?

The Court: No, that was for the anti-freeze.

Q. You went to the homes, is that right?

A. Right. I didn't personally but we had interviewers.

The Court: He means your men.

Q. Did you send these interviewers to homes that had no automobiles?

A. Yes.

[fol. 478] Q. To find out whether they preferred what?

A. To find out first if they had an automobile.

Q. If they said they did not have an automobile, then what was the next question?

A. Did they ever buy gas and oil for other persons' cars. You don't have to have a car to buy gas and oil.

Q. Did you ask them if they drove a car?

A. Yes.

Q. If they did not drive a car, was any other question asked them?

A. No.

Q. In other words, you were only interested to find out the reaction and opinions of those people who had occasion to use their product, is that right, or for themselves or purchase it for others?

A. I can't remember too clearly, but I think that on some of those particular type of surveys we did ask the people for knowledge of the particular—

Q. I am talking about that particular survey.

Mr. Grimes: Would you finish the answer.

The Witness: Well, there were several done.

Q. The one where you said if he did not drive a car or did not own a car that was the end of it, you do not want to change your answer there, do you?

A. No——

Q. It would serve no useful purpose, would it, to find out——

The Court: Wait a minute. One question. He said no, he does not wish to change his answer. Now, next question.

[fol. 479] Q. As a psychologist you know that it would serve no useful purpose to inquire of a person's opinion about something he had no use for, isn't that right?

A. I have to answer that "No." It does serve a useful purpose, because the attitude of the public toward a company of that size is an important piece of information to that company.

Q. You would like to know in a survey of that kind, naturally, as to the preferences of the public and why, is that not right? Otherwise, your survey would be worthless, isn't that right?

The Court: Just a minute.

Mr. Grimes: Two questions there.

The Court: He only wanted to know what he was told to find out. That is his answer to that. He cannot go beyond that; isn't that right?

The Witness: That's right.

Q. To determine the preferences of a person for a product or a service it is necessary as a basis to decide whether there was a need for it, isn't that right?

A. Not necessarily. A person might buy a car. The attitude of the public toward the company is an important piece of information to the company. We have done surveys where we went out to find that out, too.

Q. You take that survey now where you said that once you found out—we are talking about that particular survey now—that the respondent did not have a car or did not drive a car, no further question you said was asked.

A. That is right.

Q. What was the question given you to determine in connection with that particular survey where that [fol. 480] was done?

A. The purpose of that particular survey was to get in-

formation about the gas and oil that was purchased by the motorist the last time and why.

Mr. Grimes: The last time and why?

The Court: And why, yes.

The Witness: That's right. But I can't generalize from that particular survey to the—

The Court: Counsel wants to know this. That was your objective. When your interviewer met a person who had no reason ever to use gasoline or oil, did the interviewer pursue the question, or did he leave the premises immediately?

The Witness: On that particular survey that we are discussing, he would leave the premises; he did leave the premises at that point.

The Court: That is the point that I think counsel is trying to develop.

Q. You were not to determine in this particular survey in this case the matter of preference, were you?

Mr. Grimes: Which case?

Q. In this case, in this litigation, the subject matter of your inquiry did not deal with a preference among people, did it?

A. No. It dealt with public knowledge.

Q. This is not a matter of public opinion—that is what I am trying to say—it is not a matter dealing with public opinion, the subject with which you were concerned in this very litigation, was it?

[fol. 481] The Court: No, he says public knowledge as distinguished from public opinion.

Q. Most polls, as we understand them, such as political polls, deal with public opinion, is that right?

A. Do you say most?

Q. I am not talking professionally; I am talking of being generally known in the public.

A. There are two categories in your question.

Q. All right. Withdraw the question.

The Court: I do not think it is important.

Q. So, your purpose, you say, in this particular poll was to discover how far the public had been educated by one

means or another in the knowledge of what these three or four words meant?

The Court: Terms.

Q. The terms savings, compound interest, special interest, and thrift. Is that right?

The Court: As limited by the questions that they were asked.

A. Yes.

Q. You were not given the proposition to find out why, were you?

A. What?

Q. Why the public did not know about the difference, I mean a large percentage of the public, in the meaning of these terms?

A. No.

Q. That was possible of ascertainment by your scientific knowledge which you say you possess? Was that possible of ascertainment by your methods?

[fol. 482] Mr. Grimes: I object.

The Court: The question is withdrawn and we have a new one. I will allow that question. Was that possible of ascertainment by you?

A. It would be extremely difficult because we would have to go so far back into the person's beginning knowledge that he might not be able to recall.

Q. What I am asking is, Is it possible of calculation? I am not talking about how difficult it is. But is it possible of calculation by sample polls as to the extent of one's ignorance, as you say you established in this case?

Mr. Grimes: Excuse me. Is this question still relating to why?

Mr. Rollins: Yes, in this particular case.

The Court: Yes, but it is a new question. The question simply is, Could you have ascertained why the person interviewed made the answer which he did make?

The Witness: Why he did or did not know the answer?

The Court: Did or did not make the answer that he did make. For instance, some answered correctly, some an-

swered incorrectly, in your judgment. This question is simply as follows: In the method of laying out that poll could you have also pursued the point so that you could report why he did not know the correct answer or how it was [fol. 483] that he knew the wrong answer? You answered before that any search of that kind would go too deep, and is that still your answer?

The Witness: That would have to be my answer until I could do some preliminary testing of it in the field to find out.

The Court: I would think that would be a very deep inquiry.

Q. Let me ask you this: Your subject of inquiry was a matter of education, isn't that right, what the person knew or did not know on any given subject?

A. If you will leave out the education part, I will say yes.

The Court: Knowledge.

Q. There are two ways that a person knows about anything in this world: either through education or experience.

The Court: Wait a minute. Let us not go back.

Mr. Rollins: I am now going to the realm of psychology, Judge.

The Court: All right, but let us not go back too far.

Mr. Rollins: I am going to go to the immediate, and I think I will just leave it there and your Honor will see what I mean.

The Court: I follow your line of questioning completely.

Q. Knowledge by a person is acquired either by education of one means or another or by experience, isn't that right?

[fol. 484] The Court: I do not think you ought to ask that question because—

Mr. Rollins: If your Honor will permit me, I will show you a logical conclusion that this poll is not reliable.

The Court: But I would like, myself, to have a much longer time space at the end of your question, if I were a witness, to be expected to answer that question. I don't

know, I think there are a lot of things we know that we have not learned by education.

Mr. Rollins: Experience and education are the only two ways, Judge. It is what somebody told me or what I learned from a book, that is, education or advertisement.

Q. Is advertisement a matter of education?

The Court: Don't get into that. Ask your question, whatever you want. (To Witness:) If you cannot answer it, just say, "I cannot answer it."

The Witness: What is the question?

The Court: We ought to go back to the one question, Are there two ways of gaining knowledge—education and experience? Are you willing at this moment to say that those are the only two ways? Maybe they are, I don't know.

The Witness: Neither do I, Judge.

Q. Is advertisement a method of education?

A. I think you—

[fol. 485] The Court: Wait. I will have to answer. That word "education" is double; it comes from *educare*; you draw it out of the pupil, that is how you educate. You do not pour anything into the pupil.

Mr. Rollins: This is a knowledge pull, Judge. You can only acquire knowledge through education, either by word of mouth or by writing.

The Court: When you use the word "education" in the sense of that question, you are using it in the sense of teaching. In teaching, where education is used there, the teacher does not inflict knowledge on the pupil; the teacher draws knowledge from the pupil.

Mr. Rollins: No matter how it is, knowledge is acquired. That is my whole purpose.

The Court: All right.

Mr. Grimes: I am going to object to further interrogation along this line, upon the ground of one of two things.

The Court: Wait until we get a question.

Mr. Rollins: I am just going to show you how unreliable this poll is, if you will let me.

The Court: Go ahead, but try to keep the questions within the realm of their answers.

Q. You went to discover knowledge of the public as to three trade names, as far as you were concerned; right?

The Court: Was it not four?

[fol. 486] Q. Four: savings, thrift account—

The Court: We know them.

Q. —compound interest account, special interest account. You deal with the subject of marketing, is that right?

A. Right.

Q. Will you concede that so far as this poll is concerned they are dealing with four trade names?

Mr. Grimes: I object to that. Contrary to all the evidence.

The Court: Trade terms would be better.

Mr. Grimes: Banking terms.

The Court: I will allow the question.

Q. They are trade terms, are they not?

A. Terms used in banking, yes.

Q. Does the word Four Roses suggest anything to you?

A. Yes.

Q. What does it suggest?

A. Four Roses, whisky.

Q. The public knows that, is that right?

A. I don't know.

Q. But you knew it. How did you know it?

A. I buy Four Roses whisky.

Q. You drink whisky. Does the word LS/MFT suggest anything to you?

A. Yes.

Q. What?

A. Lucky Strike cigarettes.

Q. "Be Happy—Go Lucky," what does that slogan represent to you?

A. It's a very pleasant commercial on television.

Q. Dealing with what product?

A. Lucky Strikes, I think.

Q. That is cigarettes?

A. Right.

[fol. 487] Q. And that came to you as a matter of adver-

tisement, is that right, looking at television and through the radio and through newspapers; right?

A. I can't actually recall how the information originally came to me.

Q. But you are a psychologist, are you not?

A. Yes, but I don't study things that are so irrelevant to my—

Q. What you just told me is a matter of common knowledge, isn't that right, that the public possesses the same information that you do?

A. I haven't made that study yet.

Q. I am not talking of what percentage, but there is a great part of this public that has the same knowledge that you do on the subject I just questioned you about dealing with these products.

A. I won't disagree with you. I am sure that there must be a lot of people who hear the television programs.

Q. How is it possible to convey to the public the knowledge as what those slogans or trade terms mean except by advertisement one way or another?

A. Well, one way or another I think covers all of it.

Q. How about all media of advertising?

A. I don't understand what he means.

Q. Here is the question. What I am trying to find out in dealing with products and securities as such or services, as a matter of marketing the knowledge of the public is acquired of the particular quality and what it represents through advertisement, isn't that right?

The Court: Suppose you change that and make it possible [fol. 488] for him to answer. It is hard for him to answer what the public—

Mr. Rollins: He is a specialist, Judge. That is what they said he is.

The Court: He has not made any attempt to say what the public understands.

Mr. Rollins: That is what he expressed an opinion that it does.

Mr. Grimes: After a survey.

The Court: He is not trying to state what the public understands. Now if you change your question around, you

could ask him, what did the proponents of the advertising want the public to understand? That would be different and I think he could know what the words were and he could form a conclusion as to what the advertiser hoped to have the public understand.

Mr. Rollins: Not on the Four Roses. But your Honor gets the general idea of what I mean. Anyhow, there is no jury here, so your Honor gets the idea.

The Court: That will produce the point of evidence that you want, whereas your question in the form you are putting it he has had three or four times now and each time he said that in the absence of having made some test he cannot tell you what the public understands about something.

Q. Was it the intention of the advertiser in using the term LS/MFT to create the impression that it dealt with cigarette products?

A. I don't know what the intention of the advertiser was to use that meaningless jumble.

[fol. 489] The Court: The point is, what do you feel? Have you an opinion because of your experience as to what the advertiser wanted to convey by that slogan, if you call it such? That is what counsel would like you to answer.

The Witness: My opinion is that he wanted to call the public's attention to his product.

Q. Yet the name LS/MFT as such, did not indicate in our language that it was not a cigarette, did it?

Mr. Grimes: That it was not a cigarette?

Mr. Rollins: That is right. The language itself did not suggest that the matter was dealing with a cigarette.

Mr. Grimes: I object to that.

The Court: Or some tobacco or tobacco derivative.

Q. What I am trying to get at, is it possible by the medium of advertising to acquaint the public with a trade term to suggest that it was dealing with a particular service or product?

A. Yes, that is possible.

Q. And that applies as well to savings accounts or time deposit accounts or to any commodity or security or investment, isn't that right?

A. I can't say it applies equally well, because you have to start out with a certain public understanding of the term.

Q. Could you so educate, as in the case of the cigarette by using a term LS/MFT, or by the term Four Roses indifol. 490] eating a product, that the word "thrif" stands for a passbook account, by a medium of advertising?

Mr. Grimes: Objected to.

The Court: I will allow it.

A. With an unlimited advertising budget you can do anything.

Q. I am talking about if they have all the budget they need.

The Court: He says they can do anything. He has answered you. With an unlimited budget he thinks you could.

Q. And Lucky Strike has an unlimited budget?

Mr. Grimes: I object to that.

Q. Has it or has it not?

Mr. Grimes: Contrary to fact.

Mr. Rollins: I am assuming they have from the amount of advertising we see.

Q. If you desired to obtain knowledge on the subject as to what is a thrif account, would the probable margin of error be less in the case of a person who has a savings account or its equivalent than in one who never had a bank account of any kind?

Mr. Grimes: I object to the form of the question.

The Court: I think you had better reframe that. I did not catch the beginning of it.

Mr. Rollins: Question withdrawn.

[fol. 491] Q. In your questionnaire that you put to the public I noticed that there is an omission of any reference in the interview as to whether or not the one interviewed ever had a bank account of any kind.

The Court: That is correct, is it not?

Q. That is correct?

A. That is true.

Q. And so from the reports on these interviews which you said you had scanned you did not know whether or not any of those persons had a bank account of any kind, isn't that right?

A. For any specific person I did not know whether he ever had a bank account or not.

Q. That is with all of those 928 answers?

A. That is true.

Q. Would the margin of probable error be greater or less in the case of a person who had a bank account of some kind?

Mr. Grimes: Objected to unless we know in reference to what.

Q. In comparison to those who never had one or never had the immediate possibility of opening any such account.

Mr. Grimes: Objected to as meaningless, unless we have a standard from which we can compute error. Error is in reference to truth. The question does not include any such.

The Court: Suppose we put the question to the gentleman this way—

Mr. Rollins: Question withdrawn.

[fol. 492] The Court: Suppose I put that question. I know what you are trying to reach. Assuming that there is a margin of not error of the poll but error by the people interviewed in answering their questions, counsel wants to know, would that margin vary if you interviewed people who never had a bank account, on the one hand, and people who did have a bank account, on the other hand? Do you understand the question?

The Witness: When you say bank account, you are talking about some form of bank deposit?

The Court: Any bank account at all. One group had bank accounts of some kind and the other group never had a bank account of any kind. Would the margin of error vary in the answers which were made as to the meaning of those four terms, in your judgment?

The Witness: It would be my opinion that if they had had the experience of having a bank account, they would probably be able to give more accurate information.

Q. By what percentage?

A. I wouldn't be able to venture an estimate.

Q. Is it possible of calculation?

A. No. It would have to be done by survey designed for the particular purpose of determining that.

Q. Is there any such known survey? That is what I am trying to find out.

A. I wouldn't know.

Q. You would not know that?

A. No.

Q. Did you ever hear of any?

[fol.493] The Court: Of that particular question being sought?

Mr. Rollins: That is right.

The Court: I think if you asked him the question, could he devise such a survey, maybe you would get an answer.

Mr. Rollins: To establish a negative, sir? I am just trying to show it was a necessary ingredient in this poll to get an accurate survey. That is my purpose.

The Court: I understand what you mean, but now you have gone into the question of whether or not that could have been ascertained. I think you would have to ask the witness——

Q. All right, let me say, assuming that out of the 928 persons interviewed not one had a job and not one had a means of livelihood or an income or property of any kind, assuming that was true in the 928 persons interviewed, you say they would be in a better position to reduce the margin of error for the purposes of determination and calculation by you, on which you have expressed an opinion, than in a case where each one of them had a job, had an income and a surplus?

Mr. Grimes: Objected to as incomprehensible and unanswerable for that reason.

The Court: I think that you mean there if you assumed that the 928 people who were interviewed had no means of obtaining money so that they would have no interest in banks, would you say in your opinion that their definitions [fol.494] of those four terms would be enlightening or valuable or of no value at all.

The Witness: Can I talk to you about it just a little bit?

The Court: Yes, answer it any way you want.

The Witness: Well, the assumption disturbs me, because the assumption is so contrary to what I know about the sample. But you feel I should go ahead and make that assumption.

The Court: That is the assumption counsel gave you, so you cannot change the hypothesis.

The Witness: I see. Then the assumption is that these 928 persons, by some chance, had no income, any of them.

The Court: That is right, or money or any interest in banks.

The Witness: Then I think that those persons would probably show less knowledge of the terms than the ones that we found in our survey.

The Court: All right. That is the answer.

Q. By what percentage, if it is possible of calculation?

A. I would have to go out and make a survey among 928 people who were in this peculiar position that you are describing and then compare it with the others.

Q. Let us put it this way: Would your conclusion, an opinion rendered in this court as indicated in Exhibit CC, [fol. 495] be a reasonable opinion of the facts therein stated? In other words, is your opinion worth anything if we assume 928 didn't have a job or had no income or money of any kind?

Mr. Grimes: Objected to.

Mr. Rollins: I have not got the burden in this case.

Mr. Grimes: Perfectly pointless.

The Court: I think I will sustain the objection. The witness has answered the question. I think you have the answer. I think he answered the last question fully.

Q. These interviews or reports of the 928 of which you calculated and based your Exhibit CC here, that is the summary and the analysis, does not indicate, does it, what these persons did for a living, do they?

A. It does not, no.

Q. Do they reflect any savings or other bank accounts?

The Court: Wait a minute.

Mr. Rollins: Strike that.

Q. Or any bank accounts?

The Court: No. You see, you could ask a great many questions on this, but the exhibits speak for themselves. The testimony in this case is that the interviewers asked precisely those questions and they wrote on those papers the answers that they got. Now the witness could go on indefinitely telling us what was not on the questions.

[fol. 496] Q. And your opinion rendered in Exhibit CC was based solely upon what the interviewers gave you by way of return in the reports?

The Court: In their questionnaires.

Q. In their questionnaires. Isn't that right?

A. The Exhibit CC is based solely upon the 928 questionnaires which you already have received.

Q. You have no independent personal knowledge thereof of the facts stated in those reports given to you by these interviewers?

The Court: He said solely.

Mr. Rollins: All right, solely. I just want to show there was nothing else.

Q. Now I notice in your category you have ages. I don't know the number of the exhibit of the interviewers. I notice some of them had the age group of 21 up to age group 29, or something like that.

A. Look on one of the tables and you will find it.

Q. Do you know what page you would find that, sir?

A. Starting with page 17.

Q. Referring to your Exhibit CC, on page 17 you have a category, Total Men and Women Age 21 to 29?

A. That is right.

Q. Where did you get the age group 21 to 29, from what information?

A. You mean how did I decide to use that particular—

Q. That the persons interviewed were in the age group of 21 to 29.

A. The interviewer supplied that information.

Q. Was there a category in your questionnaire that you proposed to each respondent as to their age? Was there a [fol. 497] question put to each one in your questionnaire, "How old are you?"?

A. We did not ask that. That was an estimated age obtained from the interviewer.

Q. You did not tell that interviewer to find out how old they were, did you?

A. If they were not able to make an estimate, why, they could sometimes require them——

Q. You mean that each interviewer estimated the age of the person he interviewed or she interviewed?

A. That's right, largely that. Sometimes it is difficult to ask women about their ages.

Q. But you did not include that in the questionnaire, is that right?

A. It is in the questionnaire, if you will look at the last page of the report that you have in front of you.

Q. I am talking about in the questionnaire that you prepared as to the age.

Mr. Grimes: He is saying it is in there.

Mr. Rollins: Where is that? That is what I asked.

Mr. Grimes: Let him finish his answer and you will have it.

A. If you will look on the last page in the report just before the blue page.

Q. You have there approximate age, is that right?

A. Right.

Q. And that was given to the interviewer to appraise, himself, from personal appearance, isn't that right?

A. Right.

Q. At the age group that represented in your report, it is merely the opinion of each person who interviewed each [fol. 498] respondent rather than information furnished?

A. Well, it wasn't an opinion in all instances. In some instances we would get the information because the first question in the questionnaire when we were listing the persons was, how many persons are there in your family 21 years of age or over? People who don't object to giving their age frequently at that point would give it, but——

Q. But the ages that you had——

Mr. Grimes: Wait until he finishes.

A. —substantially that classification was based on the interviewers' estimate of age.

Q. That is what I want to know. You call this a stratified sample?

A. Not in your terminology.

Q. I am asking you, in whose terminology? What is your description of this kind of poll?

A. We are now talking about the sample?

Q. Yes, this particular sum total of all your efforts here, what kind of a poll would you say it is?

A. The sample is a probability sample, in which stratification was made by geographic area and incorporated city, town and village size.

Q. There is such a thing as a stratified sample, isn't there?

A. Yes.

Q. And the stratified sample means a cross-section, does it not, of opinion?

A. Stratification, as I understand it, is one of the steps that is used in obtaining a cross-section.

Q. And a stratified poll is more accurate than a random poll, is it not?

A. Absolutely not.

Q. It is not?

A. No.

Q. There is that distinction between a stratified poll and a random poll?

A. Would you repeat that?

[fol. 499] Q. Is there a distinction between a random poll and a stratified poll or sample?

A. Yes. Both stratification and randomness are two techniques that are used in obtaining a poll, and for the sample to be a good one you have to have randomness within strata.

Q. You say that knowledge of any particular subject prevails in a given community? That is, take a square block of any community. You say that knowledge of a per-

son on any given subject in one block in proportion is the same in the next square block?

A. No, I would not say that.

Q. Wouldn't knowledge on any subject depend upon a person's education in a large measure and his own experiences?

A. Yes.

Q. Does geographic position in any given community determine that?

A. To a large extent it does. People who live in those areas where there are large homes probably have greater means, greater education. People who live in other areas of low income frequently have less education, less knowledge.

Q. You would not say that statistics, taken as we are dealing now with the subject of polls, is an exact science, would you?

A. Statistics is an exact science, yes.

Q. I am talking about this particular subject.

The Court: Wait a minute. Does it matter?

Mr. Rollins: I know it is not. That is the reason I asked him that.

Q. Is it not one of the opening statements on the subject of statistics dealing with sample-taking that it is not an exact science?

[fol. 500] A. Well, I can only give you the answer in my own terminology. I would say that a statistical sampling is a very exact science.

Q. Is there any margin for error as to conclusions?

A. There is a possible margin of error that is due to the fact that you are taking a sample of the population rather than a complete census. It is not exactly an error but it is a possible variation from the true figure that is due to the fact that you didn't go out and interview every one of the persons in the county 21 years of age and over.

Q. Would you have gotten a better result and a more accurate result if you had interviewed persons who had a job and an earning power?

The Court: Only.

Q. Only.

A. It is kind of hard for me to answer that, because I think that we did interview many people in that category. We interviewed the people in that category—

Q. That is just merely guessing, are you not, doctor? Are you not just guessing now when you say you believe? You have nothing to base that on except that they live in Nassau County, isn't that the reason?

A. Well, you pointed out that I learn things from experience. I have had a lot of experience with this particular type of—

Q. Does the type—

The Court: Wait. He has an answer to that last question. The method that you pursued in setting up the poll is the reason for your answer, is it not?

The Witness: Right.

[fol. 501] Q. What was the method? Just picking them out of a photograph taken from the air, isn't that right.

A. The most precise method that we have been able to develop yet, and I have worked in this field for a number of years.

Q. You mean to tell me that your opinion expressed here as a scientist reflects an accurate state of knowledge on the subject of inquiry without regard to whether or not the person interviewed had a job, had an income?

A. I think that the finding—

Q. Or had any property whatever?

A. I think that the findings of the survey are an accurate reflection of the knowledge of the total population 21 years of age and over in Nassau County in reference to the four accounts that we inquired about. Does that answer it?

Q. But supposing all those you inquired about never had a job and did not work and had no property or any income, would your conclusion to the Court that the majority of people in Nassau County did not know the meaning of those four terms reflect a true condition?

Mr. Grimes: I object to the form of the question. I object to its assumption of a state of facts exactly contrary to several days of proof here.

Mr. Rollins: Judge, this man is a scientist, and a scientist

only upon data he gathers, and from the data under consideration he could not base a conclusion.

The Court: I think the question ought to be allowed—

Mr. Grimes: The testimony, sir, is—excuse me.

[fol. 502] The Court: —although I believe the witness has answered the question.

Mr. Rollins: I don't think so.

The Court: Before.

Mr. Rollins: No, sir.

The Court: The Attorney General's question is, if it is a fact that of the 928 interviewed a majority of them were—

Mr. Grimes: He said all of them.

Mr. Rollins: All of them.

The Court: You said a majority at one time.

Mr. Rollins: All right, take a majority or all of them. We have a right to assume that.

The Court: No, he answered all before. I would not allow that question. But now I understood he said a majority, consequently it is a different question, so all of them were ineligible to deposit money in banks. That is a short way of saying all this about being out of work and not having money. That is what I mean by ineligible. That is the question.

Mr. Grimes: I object to that as so hypothetical and so contrary to fact that no answer can possibly have any meaning or even utility.

Mr. Rollins: I submit, Judge, I have a right to assume my state of facts, because he was just putting on surmise and conjecture.

The Court: I will have to allow it. That is tacked on in front of the question. Would you then say that your poll [fol. 503] was an accurate reflection of the population of Nassau County over 21 years of age?

Mr. Grimes: In other words, if you have done just the opposite of what you did do, would you get the same result?

Mr. Rollins: That is not the question. Not the opposite. I am assuming what he did.

The Court: I think, as I allowed the question, if all the people were disqualified to be interested in bank deposits, I will allow that same question, if a majority of the people actually interviewed were disqualified from being inter-

ested in bank deposits. Do you understand that word "disqualified"? We are trying to shorten this thing up.

The Witness: And I am further to suppose that, contrary to the steps that we took to insure a good sample, it is a sample of persons who have no income that they could deposit?

The Court: Yes, a majority of the 928, you are to assume that. Disregard the efforts you made not to have such a one-sided interview.

The Witness: Then we would have gotten substantially different results from the ones that we had in the report.

Q. And it would not reflect the knowledge of the majority of the people in Nassau County with respect to the four terms of banking?

A. Now, then, when you say "it," are you referring to this hypothetical sample that we are discussing?

The Court: Yes.

[fol. 504] Q. That is right.

A. That hypothetical sample of 928 people none of whom had money they could deposit would not be an adequate reflection of the total county.

Q. And your opinion would also vary if it dealt with a majority who did not have any income or any money? In other words, your answer would—

The Court: That is it. You have asked it. (To Witness:) You said "all." Would you say the same if you discovered a majority of those interviewed were of that class you just defined?

The Witness: If a majority had no assets at all?

The Court: Yes, no interest in deposits or money.

The Witness: That is a little hard to answer, because I have to know what majority of the people haven't deposits. If 51 per cent, I would say.

The Court: All right. Maybe that is a sufficient answer. Go ahead.

Mr. Rollins: What was the answer to that question? I did not get it.

The Court: The first answer was, that would be very hard to answer from his knowledge. Then he added to that. Read that.

(Answer read by reporter.)

Q. Your conclusion, you said, as reflected in Exhibit CC, is based primarily upon the reports of the interview received from the interviewers, is that right?

The Court: Based entirely.

[fol. 505] Q. Entirely.

A. If you can call these tables conclusions, I would say that it is based entirely.

Q. You state it is an opinion there, do you not?

A. We don't usually use the term "conclusion."

The Court: You will have to divide that. He does not say that his table is an opinion. He says his table is what he worked out after reading the answers to the questions.

Mr. Rollins: And I ask your Honor to say it is an opinion.

The Court: The one point where his judgment entered into that—and I tried to emphasize it before—was where he exercised judgment in classifying those people and the interviewers exercised judgment in classifying those people as to age. Opinion does not appear anywhere except for those two exercising-of-judgment incidents. Now, he may give his opinion about something else, but he did not give it with respect to that. Did I state that correctly?

The Witness: That is right, yes.

Q. You have expressed an opinion in substance here that most of the people in Nassau County or a great majority of them, at least of those interviewed, do not know the meaning of the words thrift account, special interest account, and compound interest account; is that not correct? Have you expressed that opinion?

The Court: Wait.

Mr. Rollins: That is the inference here.

The Court: You will have to make it this way. He does [fol. 506] not express an opinion out of a clear sky. He gives it as his opinion, based upon the compilations that he had made here.

Mr. Rollins: He says it is correct and scientifically correct.

The Court: That is right.

Mr. Rollins: So, I am assuming what he says is based on it.

The Court: When you ask him does he give an opinion, you will have to give him the basis of what his opinion is based upon.

Mr. Rollins: We are assuming he based it on something here.

The Court: Yes.

Mr. Rollins: That is what I am starting from, from the proposition.

The Court: He will answer that question.

Q. You have expressed an opinion to the Court directly or inferentially, I don't know which—to me it appears you did it affirmatively and unequivocally—that based upon the interviews of your field personnel you have reached the conclusion that the majority of people in Nassau County do not know the meaning of the terms compound interest account, special interest account, and thrift account. Am I correct in making that assumption of fact? Did you express such an opinion?

The Court: Wait. He looks at his table now and he can answer that question. Does it indicate on the table there?

The Witness: Am I supposed to look at the table and then—

[fol. 507] The Court: Yes. Look at the table. He is asking you as an expert, after you examine that table, is it your opinion that—

Mr. Rollins: Did he say so or did he intend to infer? I am not asking him to express an opinion. I do not think he is qualified, Judge.

The Court: You asked him, did he make that statement in the way of an opinion.

Mr. Rollins: Indirectly or directly or inferentially. That is why I say they slipped one in here without asking a hypothetical question on which to base such an opinion, and they have received indirectly opinion evidence in violation of the accepted rule of evidence.

The Court: Now, your question is, Do you remember whether you gave an opinion to the effect on the witness stand here—I do not know whether you did or not, my-

self—that a majority of the people of Nassau County do not understand the meaning of those three terms, the last three of the four, as revealed by——

Mr. Rollins: Defendant's Exhibit CC.

The Court: ——the questionnaires that came before you and as is stated in your table CC.

The Witness: Is the question did I say it? Or is it in the report?

The Court: No, the question is, Did you say it sometime during your testimony.

The Witness: I didn't say it, no.

Q. Did you infer it in the preparation of Exhibit CC?

The Court: Infer it?

[fol. 508] Q. Did you so state it in words or substance?

Mr. Grimes: I will concede he said he worked on the entire survey. Maybe this will shorten it.

Q. Does it appear from an examination of Defendant's Exhibit CC?

The Court: What?

Q. That a majority of people in Nassau County—that is by indirection.

The Court: I see. I do not think we have to have his opinion about that. CC is in evidence. The percentage is there. And as I went through it I could see that that is a fact.

Q. Since your Honor has made that observation, would the same conclusions stated on Defendant's Exhibit CC appear—namely, the inference created thereby that most of the people in Nassau County do not have an understanding of the three commercial terms or trade terms: thrift account, special interest, or compound interest account? Would you make the same conclusion and express the same opinion if a majority of the people interviewed and upon whom that report is based—namely, Defendant's Exhibit CC—were not employed and had no income or property of any kind?

A. This is the same question. I have to make the supposition that, contrary to what we have done, the assumption is that we come up with a sample of people——